Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant's Sixth Amendment right of confrontation is violated where a prosecutor attacks the defendant's testimony as being fabricated because the defendant had the opportunity to hear the other witnesses in the case before taking the stand.

2. Whether a criminal defendant in a capital sentencing proceeding may be prevented from informing the jury that he will be ineligible for parole for twenty-five years.

3. Whether the "vileness" aggravating circumstance applied by the court below is unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980).

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PETITION FOR A WRIT OF CERTIORARI

Michael Wayne Williams respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Virginia Supreme Court (App., *infra*, 1a) is reported at 450 S.E.2d 365.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on November 4, 1994. A petition for rehearing (App., *infra*, 23a) was denied on January 13, 1994. On March 20, 1995, Chief Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including May 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves various capital sentencing provisions in the Virginia Statutes Annotated, which are included in the appendix, *infra*, at 30a-34a.

STATEMENT

On January 6, 1994, a jury found Petitioner guilty of the capital murders of Morris and Mary Keller, and other related felony offenses (App., *infra*, 1a). *See* Va. Code Ann. § 18.2-31 (Michie Supp. 1994) (defining capital murder to include, among other things, murder during an armed robbery and multiple murders), App., *infra*, 30a. The next day, the same jury sentenced Petitioner to death. App., *infra*, 2a. In a decision entered on November 4, 1994, the Virginia Supreme Court rejected Petitioner's appeal and affirmed his capital murder conviction and sentence. App., *infra*, 22a. On January 13, 1995, the Virginia Supreme Court denied rehearing. App., *infra*, 23a.

A. Virginia's Capital Sentencing Scheme

Under Virginia law, a defendant convicted of capital murder may be sentenced to death if either of two aggravating

circumstances is found: (1) "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" or (2) the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2(1) (Michie 1990 & Supp. 1994), App., *infra*, 30a. When the guilt phase of a capital trial is conducted before a jury, the same jury, in a separate proceeding held as soon as possible after the guilt phase, must determine whether the Commonwealth has proven one of these aggravating circumstances beyond a reasonable doubt. Va. Code Ann. §§ 19.2-264.3(C), 19.2-264.4(C), App. *infra*, 30a-32a.

If the jury determines that the defendant is eligible for the death penalty, it must then recommend a sentence of either death or life imprisonment. Va. Code Ann. § 19.2-264.2, App., *infra*, 30a. In making this decision, the jury may consider "any matter which the court deems relevant," including "the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense." Va. Code Ann. § 19.2-264.4(B), App., *infra*, 31a. If the jury recommends a sentence of death, it must do so on a written form specifying that it has found either vileness or future dangerousness and considered the mitigating evidence. Va. Code Ann. § 19.2-264.4(D)(1), App., *infra*, 32a. The trial judge must adopt the jury's recommendation of death unless "good cause" is shown. Va. Code Ann. § 19.2-264.5, App., *infra*, 33a. If the jury does not recommend death, the trial judge must sentence the defendant to life imprisonment. Va. Code Ann. §§ 19.2-264.4(A), (E), App., *infra*, 31a, 33a.

The Virginia capital sentencing scheme contains no provisions concerning whether the jury may be informed of parole eligibility or ineligibility.

B. Pretrial Proceedings

On September 13, 1994, approximately three months before trial, Petitioner moved to prohibit the imposition of the death

penalty on the ground that various aspects of the Virginia capital sentencing scheme are unconstitutional. 1 Tr. 46-47.[1] In particular, Petitioner argued that the "vileness" aggravating factor employed in Virginia is identical to the factor found unconstitutionally vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980). 1 Tr. 79-83. Petitioner also argued that the limiting construction adopted by the Virginia courts was itself unconstitutionally vague. 1 Tr. 83-91. On November 19, 1993, the trial court denied Petitioner's motion. 1 Tr. 130. Moreover, the trial court did not provide the jury with any limiting instruction on the vileness factor, choosing instead to quote the statutory language to the jury. 1 Tr. 193, 4 Tr. 1557-58.

Before trial, Petitioner also moved for permission to inform the jury of the period of time during which he would be ineligible for parole under a sentence of life imprisonment. Specifically, Petitioner asked for permission to question jurors on the subject during voir dire, introduce evidence during the sentencing phase, or submit jury instructions that would be given before the jury decided whether to recommend death or life imprisonment. 1 Tr. 48-49. The trial judge rejected Petitioner's request in its entirety. 1 Tr. 136.

C. The Trial and Sentence

The trial focused largely upon the conflicting testimony of Petitioner and his alleged co-assailant, Jeffrey Alan Cruse. It was undisputed that on the night of February 27, 1993, Cruse and Petitioner forced their way into the home of Morris and Elizabeth Keller, the Kellers were robbed, their house burned, Mrs. Keller raped, and both Kellers killed by multiple gunshots at close range. The issue at trial was who bore chief responsibility for these acts.

Cruse testified first. He asserted that Petitioner decided to commit a robbery, that Petitioner selected the Kellers' home, and that Petitioner dictated what they did once inside. 3 Tr. 887,

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[1] Citations to the four volumes of the Joint Appendix submitted to the Virginia Supreme Court are designated "Tr."

888-89, 895, 902, 907. Cruse further testified that Petitioner was responsible for the decision to take the Kellers into the woods. Indeed, Cruse claimed that he was unaware of what Petitioner was planning to do until Petitioner allegedly said, "We'll shoot at the count of three." 3 Tr. 908, 914. Cruse also claimed that, while Petitioner shot Mr. Keller on the count of three, Cruse hesitated and did not shoot Mrs. Keller until Petitioner "told me to shoot." 3 Tr. 915. According to Cruse, at that point, Mr. Keller began to rise, and Petitioner shot both Mr. and Mrs. Keller several more times to ensure that they were both dead. 3 Tr. 916-19.

Cross-examination of Cruse revealed a series of falsehoods. During the preliminary hearing, Cruse falsely denied that he had been convicted of any crime involving lying, cheating, or stealing. 3 Tr. 970-71. Cruse gave the police conflicting accounts of his activities on the night of February 27, 1993, one placing him in Richmond and another admitting his presence at the Kellers' home but omitting any mention of the rape of Mrs. Keller. 3 Tr. 961-68. Most importantly, while Cruse agreed to testify against Petitioner in exchange for a promise that he would not be charged with capital murder, that plea bargain was rescinded when the prosecutor learned that Cruse had failed to disclose his participation in the rape of Mrs. Keller. App., *infra*, 4a.

When Petitioner took the stand, he admitted participating in the robbery of the Kellers, the murder of Mr. Keller, and the burning of the Kellers' house. 3 Tr. 1199-1207. Petitioner did not, however, agree that Cruse had meekly followed Petitioner's instructions throughout those incidents. According to Petitioner, Cruse "actively participated" in the decision to commit the robbery, and, more importantly, brought up the idea of murdering the Kellers in order to eliminate them as potential witnesses. 3 Tr. 1195-96, 1204-05. Petitioner also disputed Cruse's account of the murders; according to Petitioner, Cruse shot Mrs. Keller without hesitation and decided, once Mr. Keller stood up, to fire additional rounds into the Kellers to be certain that they were dead. 3 Tr. 1205-07.

On cross-examination, the prosecutor attacked Petitioner's credibility by stressing that Petitioner had exercised his right to be present during the testimony of Cruse and the other witnesses. The prosecutor's first two questions were, "do you know what a Motion to Exclude Witnesses is," and "[h]ave you been watching this trial as we've been going along here?" 3 Tr. 1211. After establishing — through another eight questions (3 Tr. 1211-12) — that Cruse and the rest of the prosecution witnesses did not have a chance to hear the testimony of other witnesses, the prosecutor asked rhetorically,

> You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify, isn't that correct?

3 Tr. 1212-13. When Petitioner's counsel objected that Petitioner was exercising his constitutional right to confront his accusers, the trial judge overruled the objection and permitted the question to stand. 3 Tr. 1214-15. Later, the prosecutor asked Petitioner whether, "as a convicted felon who has heard all the testimony of all the witnesses in here," he had testified truthfully. 3 Tr. 1223.

The prosecutor returned to this theme in his summation. He argued that Petitioner was not as credible as Cruse because Petitioner had exercised his right under the Sixth Amendment to be present at trial and confront the witnesses against him:

> Petitioner sat right here — and he's got a right to do it — and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened.

3 Tr. 1263.

The jury returned guilty verdicts on all counts against Petitioner and, finding both the future dangerousness and vileness factors present, recommended death. App., *infra*, 1a-2a. After consider-

ing the probation officer's report, the trial judge adopted the jury's recommendation and sentenced Petitioner to death. App., *infra*, 2a.

Approximately one month later, Cruse pleaded guilty to the capital murder of Mary Keller and related crimes, and was eventually sentenced to life imprisonment. App., *infra*, 24a-29a.[2]

D. The Appeal

On appeal to the Virginia Supreme Court, Petitioner argued, *inter alia*, (1) that the prosecutor violated Petitioner's right of confrontation by commenting upon his exercise of that right; (2) that the Due Process Clause and the Eighth Amendment required that the jury be informed that he would be ineligible for parole for at least twenty-five years;[3] and (3) that the language the trial judge used to instruct the jury on the vileness factor was unconstitutionally vague.

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[2] This Court may take judicial notice of Cruse's plea and the judgment against him because those facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Kowalski v. Gagne*, 914 F.2d 299, 305-06 (1st Cir. 1990) (taking judicial notice of a murder conviction under the "well-accepted" rule that "federal courts may take judicial notice of proceedings in other courts") (citations omitted).

[3] Because Petitioner was sentenced to life imprisonment for one of his non-capital felony convictions, 4 Tr. 1292, under Virginia law, if he had been sentenced to life imprisonment on his capital murder convictions, he would not have been eligible for parole for thirty years. *See* Va. Code Ann. § 53.1-151(D) (Michie 1994), App., *infra*, 34a. If maximum good time credits were accrued, this period could be reduced by one-sixth, *i.e.*, five years. *See* Va. Code Ann. § 53.1-199 (Michie 1994), App., *infra*, 34a (providing that persons "sentenced upon a conviction of murder in the first degree . . . shall be eligible for no more than ten days good conduct credit for each thirty days served" and "[o]ne-half of such credit shall be applied to reduce the period of time he shall serve before being eligible for parole").

The Virginia Supreme Court summarily rejected each of these arguments. With respect to the prosecutor's comment on Petitioner's exercise of his right of confrontation, the court "fail[ed] to see how those rights are violated by a question that reflected what the jury already knew." App., *infra*, 15a. The trial court similarly rejected Petitioner's parole eligibility claim by referring to a decision issued that same day (App., *infra*, 10a), which reasoned that "evidence of parole eligibility and ineligibility . . . is not a relevant consideration in fixing the appropriate sentence." *Ramdass v. Commonwealth*, 450 S.E.2d 360, 361 (Va. 1994) (quotation omitted), *cert. denied*, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995). Finally, the Virginia Supreme Court rejected Petitioner's challenge to the application of the vileness factor by noting that it had previously rejected similar challenges. App., *infra*, 5a.

REASONS FOR GRANTING THE WRIT

The decision below presents three issues worthy of this Court's review. To begin with, this case raises a fundamental question of criminal procedure: whether a prosecutor may comment upon a defendant's exercise of his right to confront adverse witnesses. It also presents an issue left open by this Court's decision last Term in *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994): whether a State may prohibit the introduction of evidence that a defendant will be ineligible for parole for a significant number of years. Finally, the decision below presents the question whether Virginia's statutory vileness factor, which is similar to aggravating factors used in many death penalty statutes, is unconstitutionally vague. The lower courts are sharply divided over these issues, and each of them is indisputably important. Thus, review by this Court should be granted.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE LOWER COURTS OVER WHETHER A PROSECUTOR MAY COMMENT ON A CRIMINAL DEFENDANT'S EXERCISE OF HIS RIGHT TO CONFRONT ADVERSE WITNESSES.

The first issue in this case presents a clash between two competing interests. On the one hand, states have a legitimate interest in preventing perjury by criminal defendants. *See, e.g., Brooks v. Tennessee*, 406 U.S. 605, 607 (1972) (recognizing the "occasional readiness [of criminal defendants] to adapt [their] testimony . . . to victory rather than veracity") (quotation omitted). On the other hand, a defendant's Sixth Amendment right to confront the witnesses against him also serves an important truth-seeking function, namely, detecting and deterring perjury on the part of the prosecution's witnesses. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 846 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). Thus, in this case, the prosecutor's comment on Petitioner's exercise of his Sixth Amendment right of confrontation raises a fundamental question: whether a state's interest in revealing and preventing perjury by criminal defendants justifies adverse prosecutorial comment on a defendant's exercise of his Sixth Amendment rights.

The lower courts are hopelessly divided over this issue, and the rationale adopted by the court below is flatly inconsistent with related decisions of this Court under the Fifth Amendment. Moreover, this issue is clearly important, since the ability of prosecutors to comment on a criminal defendant's exercise of his Sixth Amendment rights affects every defendant who considers testifying at trial. Accordingly, this Court should grant review of this issue.

1. The lower courts have adopted three conflicting and irreconcilable approaches to prosecutorial comment on a defendant's exercise of his Sixth Amendment right of confrontation. First, three courts of final resort prohibit such comment altogether. *See Jenkins v. United States*, 374 A.2d 581 (D.C.), *cert. denied*, 434 U.S. 894 (1977); *State v. Rose*, 622

A.2d 78 (Me. 1993); *Murray v. State*, 781 P.2d 288 (Nev. 1989). Second, the Michigan Supreme Court, while generally forbidding such comment, permits it where there is evidence that the defendant has tailored his testimony to correspond with the testimony of the witnesses he has confronted. *See People v. Buckey*, 378 N.W.2d 432 (Mich. 1985). Finally, like the Virginia Supreme Court, the New Mexico Supreme Court permits such comment under all circumstances. *See State v. Hoxsie*, 677 P.2d 620 (N.M. 1984), *overruled on other grounds*, *Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989).

The courts forbidding prosecutorial comment on the exercise of the right of confrontation rely upon decisions of this Court under the Fifth Amendment. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965) (holding that Fifth Amendment forbids comment on defendant's exercise of right not to testify). For example, in *Jenkins v. United States*, the District of Columbia Court of Appeals held that the Sixth Amendment forbids comment on a defendant's exercise of the right of confrontation:

> In effect, the prosecutor sought to have the jury draw adverse inferences from [the defendant's] exercise of his right to confront the witnesses against him. *Cf. Griffin v. California*, 380 U.S. 609 (1965). This, we think, was improper, and in the future, such comments on a defendant's presence in the courtroom should not be countenanced by the trial court.

374 A.2d at 584 (footnote omitted). Although *Jenkins* ultimately found the error harmless, the same court subsequently reversed a conviction obtained through the use of a similar comment. *See Dyson v. United States*, 418 A.2d 127, 131 (D.C. 1980).

The Supreme Court of Nevada has also held that prosecutorial comment on a defendant's presence at trial is unconstitutional. In *Murray v. State*, the prosecutor stated in his closing argument that the defendant, unlike the prosecution's witnesses, "was able to sit here and listen to everyone testify." 781 P.2d at 290. Recognizing that the purpose of the prosecutor's comment was to undermine the defendant's credibility by suggesting that he "could fabricate a story consistent with the other testimony before he had

to testify," *id.* at 291, the Nevada Supreme Court vacated the conviction. It found these comments "strikingly similar" to prosecutorial comments on a defendant's exercise of his right to remain silent found violative of the Fifth Amendment in a prior Nevada case. *Id.* Since that prior case held that "prosecutorial comment on a defendant's post-arrest, post-*Miranda* silence for substantive or for impeachment purposes is constitutionally prohibited," *Aesoph v. State*, 721 P.2d 379, 382 (Nev. 1986) (citation omitted), the Nevada Supreme Court concluded that prosecutorial comment on a defendant's presence at trial was unconstitutional as well. *See Murray v. State*, 781 P.2d at 291.

Other courts have reached the same conclusion. In *State v. Rose*, the Supreme Judicial Court of Maine found it improper for a prosecutor to ask a criminal defendant whether he was "the only witness who testified in this trial that sat through all the testimony of the other witnesses." 622 A.2d at 78 (quotation omitted); *but see id.* (finding no reversible error because issue was not properly preserved). In addition, although the New York Court of Appeals has yet to consider the issue, an intermediate court in New York has found such comment improper. *See People v. Torres*, 605 N.Y.S.2d 380, 381 (App. Div. 1993) (per curiam) ("[I]t was improper for the prosecutor to comment during cross-examination that the defendant was the only witness who had the benefit of listening to everyone else's testimony, and to suggest that he had tailored his testimony.").

The Michigan Supreme Court has taken a different approach, holding that prosecutorial comment on a defendant's presence at trial is permissible under certain limited conditions. In *People v. Buckey*, there was evidence that the defendants had tailored their testimony to the testimony of other witnesses. A bare majority of the Michigan Supreme Court reasoned that, in such a situation, a prosecutor could remind the jury that the defendant had heard the testimony of the prosecution's witnesses, since such a comment "only indirectly relate[s] to defendants' right to be present at trial." 378 N.W.2d at 438. The majority took pains, however, to distinguish the case before it from cases in which there is no evidence of fabrication:

> We do not suggest that a prosecutor may, in every case, argue that a defendant who testifies has fabricated his testimony merely because he has sat through his trial and heard the evidence. . . . When, as here, however, the evidence does support that inference, the argument is perfectly proper comment on credibility.

Id. at 439.

This decision provoked two vigorous dissents. Justice Cavanagh argued that it was irrelevant whether there was independent evidence of perjury, noting that "[t]he focus should be on whether the [the prosecutor's] comments could impermissibly chill or infringe the exercise of a constitutional or statutory right." *Id.* at 440 (Cavanagh, J., dissenting). Finding that prosecutorial comment chills the exercise of the Sixth Amendment right of confrontation even where there is independent evidence of fabrication, Justice Cavanagh concluded that the comments at issue "impermissibly infringe[d]" on the defendant's Sixth Amendment rights. *Id.* at 440. Justice Levin agreed, adding, among other things, that any suggestion that a defendant has tailored his testimony to the testimony of a prior witness is impermissible because it assumes, contrary to the presumption of innocence, that the defendant is lying. *See id.* at 446-48 (Levin, J., concurring in part and dissenting in part).

Like the court below, the New Mexico Supreme Court has adopted a more extreme approach, holding that prosecutorial comment on a defendant's exercise of his right to confront adverse witnesses does not violate the Confrontation Clause under any circumstance. In *State v. Hoxsie*, the prosecutor suggested during cross-examination that the defendant was tailoring his testimony to the testimony of the witnesses before him. *See* 677 P.2d at 623. The New Mexico Supreme Court held that the comment did not deprive the defendant of a fair trial because "[t]he State has a right to inquire into and comment upon the credibility of the defendant as a witness" and because "the purposes of the right of confrontation were respected." *Id.* at 622 (citations omitted). The Supreme Court of South Dakota has

likewise upheld a prosecutor's comment on a defendant's exercise of his right to confront, although in that case the challenge was based upon the defendant's right to a fair trial rather than the right of confrontation. *See State v. Howard*, 323 N.W.2d 872, 874 (S.D. 1982).[4]

In sum, the lower courts are sharply divided over whether — and, if so, under what circumstances — a prosecutor may comment on a defendant's exercise of his right of confrontation. Review is necessary to resolve this conflict.

2. The rationale adopted by the court below is flatly inconsistent with this Court's decisions under the Fifth Amendment. The court below found that the prosecutor's comments did not violate Petitioner's constitutional rights because those comments "reflected what the jury already knew." App., *infra*, 15a. This Court has never endorsed such a rationale. To the contrary, this Court has repeatedly held that, where a defendant exercises a constitutional right at trial, prosecutorial comment on the exercise of that right is impermissible. *See, e.g., Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (per curiam) (comment on refusal to testify at trial); *Griffin v. California*, 380 U.S. 609 (1965) (same); *Johnson v. United States*, 318 U.S. 189, 196-97 (1943) (comment on invocation of privilege against self-incrimination).

For example, in *Griffin v. California*, this Court addressed a prosecutor's (and then a trial judge's) comments on a defendant's refusal to testify. Noting that the defendant was present at several key events relating to the charged offense, both the prosecutor and the trial judge instructed the jury to infer that the defendant would have testified had he had any exculpatory evidence to

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[4] While the courts of final resort in New Jersey and Texas have yet to address the issue, intermediate courts in both states have rejected challenges to prosecutorial comment on a defendant's exercise of his right to confront the witnesses against him. *See State v. Robinson*, 384 A.2d 569 (N.J. Super. Ct. App. Div. 1978); *Reed. v. State*, 633 S.W.2d 664, 666 (Tex. Ct. App. 1982).

offer. *See* 380 U.S. at 610-12. Although the jury was obviously aware that the defendant did not testify, this Court reversed. The prosecutor's comments, this Court found, were "a penalty imposed . . . for exercising a constitutional privilege" that "cut[] down on the privilege [against self-incrimination] by making its assertion costly." *Id.* at 614.

In reaching this conclusion, the Court rejected the State's suggestion that the adverse inference the prosecutor urged the jury to draw from the defendant's refusal to testify was "natural and irresistible." *Id.* First, this Court found that such an inference was neither natural nor irresistible: even a defendant with exculpatory evidence to give might refuse to testify out of "fear that his prior convictions will prejudice the jury." *Id.* at 615 (quotation omitted). Second, this Court found that even if an adverse inference were warranted, the comment by the prosecutor or the judge would be improper:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614. Accordingly, the Court held that the comments of the prosecutor and the trial judge constituted reversible error. *See id.* at 615.

The decision below cannot be reconciled with *Griffin*. As in *Griffin*, the prosecutor's comments in this case imposed a penalty on Petitioner for exercising his right of confrontation, thereby "cutting down on the privilege by making its assertion costly." Similarly, as in *Griffin*, the mere fact that the jury knew that Petitioner had exercised his right to confront the witnesses against him did not give the prosecutor license to "solemnize" the defendant's attendance at trial "into evidence against him." Like the defendant in *Griffin*, Petitioner had a legitimate reason to exercise his constitutional right to confront the witnesses against

him.[5] Indeed, virtually every criminal defendant chooses to be present at trial.

Nor can there be any doubt that the prosecutor's comments prejudiced Petitioner. The trial boiled down to a swearing contest between Petitioner and Jeffrey Allan Cruse, an admitted liar with a most compelling reason for perjury: avoiding the death penalty. Cruse accused Petitioner of responsibility for the most vile and heinous aspects of the murders of Morris and Mary Keller. Petitioner, by contrast, testified that Cruse bore the lion's share of the responsibility. No doubt well aware of Cruse's problems as a witness, the prosecutor began his cross-examination of Petitioner with no less than twelve questions emphasizing the fact that Petitioner had exercised his right of confrontation. 3 Tr. 1211-14. Moreover, the prosecutor returned to this issue both at the end of his cross-examination (3 Tr. 1223) and in his closing argument (3 Tr. 1223, 1263). By urging the jury to find Cruse the more credible witness because Petitioner had exercised his right of confrontation, the prosecutor improperly tipped the scales against Petitioner.

3. The decision below has important and disturbing implications. If allowed to stand, the decision will permit prosecutors to penalize a defendant's exercise of his right of confrontation in every case in which a criminal defendant testifies. The threat of such improper cross-examination will also deter other defendants from taking the stand. Finally, if the rationale of the decision below is applied broadly, it may affect the exercise of numerous other constitutional rights. For example, based upon the decision below, prosecutors may feel free to comment on the

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[5] As this Court has observed,

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back."

Coy v. Iowa, 487 U.S. at 1019.

exercise of any constitutional right invoked in the presence of the jury, including the right to retain counsel. Prosecutors may also be emboldened to comment on the fact that a defendant demanded a preliminary hearing, moved to suppress evidence, or obtained materials under *Brady v. Maryland*, 373 U.S. 83 (1963), because the exercise of these rights arguably facilitates fabrication of testimony as readily as the exercise of the right of confrontation. For these reasons as well, this Court should review the decision below.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE LEFT OPEN LAST TERM IN *SIMMONS V. SOUTH CAROLINA*.

Last Term, in *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), this Court held that, where a State places in issue the future dangerousness of a defendant convicted of a capital crime, due process requires that the defendant be allowed to inform the jury that he will never be eligible for parole. The case generated no less than five separate opinions — a plurality, three concurrences, and a dissent.

In the proceedings below, Petitioner was not allowed to inform the jury that under a sentence of life he would be ineligible for parole for at least twenty-five years. As a consequence, this case presents two issues left open by *Simmons*: (1) whether due process requires that, where the State raises the issue of future dangerousness, the jury must be informed that the defendant would be ineligible for parole for a substantial number of years; and (2) whether, independent of the arguments advanced by the State, the Eighth Amendment requires that juries be informed of how long a defendant sentenced to life imprisonment would be ineligible for parole.

1. Although *Simmons* was decided less than a year ago, the lower courts are already divided over how to apply it to the question of long-term, but less than permanent parole ineligibility. One state supreme court has held that, by the logic of *Simmons*, due process requires that the jury be informed of the defendant's ineligibility for parole whenever the State raises the issue of

future dangerousness. *See Clark v. Tansy*, 882 P.2d 527, 533 (N.M. 1994). Like the decision below, one federal court of appeals and two state supreme courts have disagreed, and have limited *Simmons* to situations in which the defendant will never be eligible for parole. *See Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994) (en banc), *petition for cert. filed*, No. 94-1522, 63 U.S.L.W. 3707 (U.S. March 15, 1995); *State v. Price*, 448 S.E.2d 827 (N.C. 1994); *Smith v. State*, No. 71,433, 1995 Tex. Crim. App. LEXIS 26 (Tex. Crim. App. March 8, 1995) (en banc), *cert. denied*, 115 S. Ct. 1368 (1995).[6]

In *Clark v. Tansy*, the New Mexico Supreme Court held that "the Due Process Clause assures that when the prosecutor urges the defendant's future dangerousness as cause for the death penalty the jury will be accurately informed of the period of his parole ineligibility." 882 P.2d at 533. This conclusion was, in the New Mexico Supreme Court's view, compelled by the logic of *Simmons*. According to that court, *Simmons* recognized that the Due Process Clause guarantees defendants the opportunity "to rebut, with all relevant mitigating evidence, the prosecutor's argument that the defendant's future dangerousness is cause for the death penalty." *Id.* Because "relevant mitigating evidence includes the length of incarceration facing the defendant if he is not sentenced to death," *id.* (citing *Simmons*, 114 S. Ct. at 2193), and evidence of partial (as well as permanent) parole ineligibility is relevant to determining the length of incarceration that the defendant faces, the New Mexico Supreme Court concluded that under the logic of *Simmons*, criminal defendants have the right to inform juries about partial parole ineligibility. *See id.*

By contrast, in *State v. Price*, the North Carolina Supreme Court, like the court below, held that *Simmons* is "limited to those situations where the alternative to a sentence of death is life imprisonment without possibility of parole." 448 S.E.2d at 831.

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[6] The Texas Court of Criminal Appeals has "final appellate jurisdiction" over criminal matters in that state. Tex. Const. Art. 5, § 5; *see State ex. rel. Wilson v. Briggs*, 351 S.W.2d 892 (Tex. Crim. App. 1961).

The court noted that *Simmons* was "expressly confined to situations in which a defendant sentenced to life imprisonment will not be eligible for parole." *Id.* In the North Carolina Supreme Court's opinion, it was "left to the states to determine whether and under what circumstances juries should be instructed on parole eligibility when it was available to life-sentenced defendants." *Id.* at 831 (citation omitted).

For similar reasons, in *Allridge v. Scott*, the Fifth Circuit found *Simmons* limited to situations where a defendant is legally ineligible for parole. In the Fifth Circuit's opinion, *Simmons* was so limited because "evidence of such ineligibility is inherently 'truthful.'" 41 F.3d at 221-22. By contrast,

> if a defendant's ineligibility is a matter of fact, *i.e.*, if the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.

Id. at 222 (emphasis in original). The Fifth Circuit also suggested that *Simmons* is inapplicable when "the state argues that the defendant poses a future danger to *everybody*, fellow inmates included." *Id.* at 222 n.12 (emphasis in original).[7]

In *Smith v. State*, a plurality of the Texas Court of Criminal Appeals offered still another interpretation of *Simmons*. Based upon this Court's opinion in *Gardner v. Florida*, 430 U.S. 349 (1977), the plurality concluded that *Simmons* applies only when the prosecutor injects "the issue of appellant's potential early release from prison based upon parole" into the case. 1995 Texas Crim. App. LEXIS 26, at *38-*46 & n.24 (Meyers, J.).

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[7] In addition, although the Ohio Supreme Court has yet to address the issue, an Ohio appellate has held that *Simmons* does not apply unless a defendant is permanently ineligible for parole. *See State v. Mills*, No. C-930817, 1995 Ohio App. LEXIS 910, at *11-*12 (Ohio Ct. App. March 15, 1995).

Because, in arguing future dangerousness, the prosecution in *Smith* did not broach the issue of when the defendant would be paroled, the plurality concluded that *Simmons* was inapposite. *See id.* at *46.

The two other judges in the majority refused to join in this interpretation of *Simmons*. Noting that "*Simmons* is a collection of five separate opinions," one judge simply despaired of deriving any guidance from *Simmons* and refused to hold state procedures unconstitutional "absent clear direction from the Supreme Court." *Id.* at *60-*61 (Mansfield, J., concurring in part and concurring in the judgment). The other judge found that "the Supreme Court perceives a distinction" of constitutional magnitude between "life without the possibility of parole and being parole eligible after serving 40 years in confinement" and felt compelled to follow it even though he did not profess to understand it. *Id.* at *58-*59 (Baird, J., concurring in the judgment).

The three dissenters believed that the failure to inform the jury of the defendant's parole eligibility was unconstitutional. Like the New Mexico Supreme Court, two dissenters determined that the logic of *Simmons* could not be "limited to the no-parole situation." *Id.* at *97 (Clinton, J., dissenting). In their opinion, "[h]ow much of his life the capital defendant will spend in prison is relevant to the future dangerousness determination in exactly the same way as the fact that he will spend the rest of his life there." *Id.* at *98. They also found that *Simmons* requires that criminal defendants be allowed to present any relevant evidence concerning future dangerousness, whether or not the State injects the issue of parole into the case. *See id.* at *103-*108. The third judge dissented on Eighth Amendment grounds. *See id.* at *112 (Maloney, J., dissenting).

2. There is also a conflict among the lower courts over whether the Eighth Amendment, independent of any allegation of future dangerousness, requires that juries be informed of the period for which a defendant would be ineligible for parole.

Indeed, one judge on the Texas Court of Criminal Appeals has called for a definitive ruling from this Court on this issue.[8]

Three courts of final resort have held that the Eighth Amendment requires that capital sentencing juries be informed of parole eligibility. *See State v. Bey*, 610 A.2d 814 (N.J. 1992); *State v. Henderson*, 789 P.2d 603 (N.M. 1990), *overruled on other grounds, Clark v. Tansy*, 882 P.2d 527 (1994); *Doering v. State*, 545 A.2d 1281 (Md. 1988). In *Doering*, the Maryland Court of Appeals relied upon the Eighth Amendment's requirement that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1985) (quotation omitted). It determined that evidence concerning an "appropriate alternative sentence" is "relevant mitigating evidence." *Doering*, 545 A.2d at 1295. Interpreting the State's death penalty statue to be consistent with the Eighth Amendment, the court held:

> Where, as here, the defendant in a capital sentencing proceeding seeks to place before the jury relevant and competent information concerning his eligibility for parole in the event a life sentence is imposed, that request should be granted.

Id.

In *State v. Bey*, the New Jersey Supreme Court also held that capital sentencing juries must be informed of parole eligibility. The court started from the premise that the "principle of reliability in capital sentencing requires that a jury be fully informed of its responsibility in determining the appropriateness of the death penalty." 610 A.2d at 836 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976)). Finding that juries often speculate about when a defendant will be released in

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[8] *See Smith*, 1995 Tex. Crim. App. LEXIS 26, at *58 n.2 (Baird, J., concurring in the judgment) ("I believe it more prudent for the Supreme Court to resolve the Eighth Amendment issue. Hopefully, that resolution will garner more than a plurality of the Court.").

deciding whether to impose the death penalty, the court held that the Eighth Amendment requires that juries be informed about parole eligibility to ensure that the death penalty is not based upon an "unwarranted fear of the defendant's premature release from prison." 610 A.2d at 836 (citations omitted); *but see id.* at 839 (finding that the judge's refusal to instruct the jury on parole eligibility was harmless due to defense counsel's questioning on voir dire).

In *Henderson*, the New Mexico Supreme Court relied upon both the requirement that defendants be allowed to offer evidence of mitigating circumstances and the heightened standard of reliability in death penalty cases. First, noting that "states cannot limit the sentencer's consideration of any element that could cause it to *decline to impose* the death penalty," the court found that the Constitution requires the admission of evidence of parole eligibility. 789 P.2d at 606-07 (quotation omitted; emphasis in original). Second, finding that at least one juror believed that a defendant sentenced to life imprisonment would be eligible for parole in ten years, the court concluded that "it was error for the court not to have restored a proper balance . . . by instructing [the jury]" when the defendant would in fact be eligible. *See id.* at 606, 607.

In addition to the decision below, four lower courts have disagreed with the foregoing authorities and held that the Eighth Amendment does not require that juries be informed when a capital defendant will be eligible for parole. *See Ingram v. Zant*, 26 F.3d 1047 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1137 (1995); *Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991), *cert. denied*, 114 S. Ct. 732 (1994); *Burgess v. State*, 450 S.E.2d 680 (Ga. 1994), *petition for cert. filed*, No. 94-8481 (U.S. March 17, 1995); *Elliott v. State*, 858 S.W.2d 478 (Tex. Crim. App. 1993) (en banc). For example, in *Ingram v. Zant*, the Eleventh Circuit held that "although it is constitutionally permissible to instruct the jury regarding the possibility and effects of parole, the Federal Constitution does not require such an instruction." 26 F.3d at 1052. In so holding, the Eleventh Circuit expressly rejected both the argument that information concerning parole eligibility is a

mitigating circumstance and the argument that there is an "intrinsic unreliability arising from the jury's alleged misconceptions regarding parole." *Id.* at 1053. The Fifth Circuit and the Texas Court of Criminal Appeals have reached similar conclusions. *See Knox v. Collins*, 928 F.2d at 660; *Elliott v. State*, 858 S.W.2d at 489-90.

In *Burgess v. State*, the Georgia Supreme Court relied on *Simmons*. It noted that in *Simmons* the plurality stated that "'[i]n a State in which parole is available, . . . we shall not lightly second-guess a decision whether or not to inform a jury regarding parole.'" 450 S.E.2d at 693-94 (quoting *Simmons*, 114 S. Ct. at 2196). It also observed that in *Simmons*, the Court stated that states may withhold information concerning "commutation, pardon, and the like" in order to "provide greater protection in the States' criminal justice system than the Federal Constitution requires," *Id.* (quotation omitted). The Georgia Supreme Court then concluded that the trial court was not required to inform the jury of the defendant's parole eligibility. The court did not explain, however, how its holding provides criminal defendants with greater protection than the Federal Constitution requires.

3. There can be no doubt that the issue of parole eligibility arises frequently. The conflict that has already emerged since this Court's *Simmons* decision is proof of this. Nor is the frequency with which this issue arises surprising. The Due Process Clause is implicated every time a prosecutor urges capital punishment based upon future dangerousness, which, as this Court has noted, is done routinely. *See Simmons*, 114 S. Ct. at 2193 (plurality opinion). This is especially true in Virginia, where future dangerousness is one of only two aggravating factors. App., *infra*, 30a. Furthermore, the Eighth Amendment is implicated every time a defendant believes that evidence of parole eligibility may dissuade a jury from imposing the death penalty.

Nor can there be any doubt about the importance of these issues. As this Court recognized last Term, even in the face of instructions to the contrary, juries frequently decide whether to impose the death penalty based upon their understanding of a

defendant's parole eligibility. *See Simmons*, 114 S. Ct. at 2197. This understanding is often erroneous. *See id.* at 2197 & n.9; *see also* Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 (1989) (noting the widespread perception in Virginia that a person convicted of capital murder serves only ten years before being released on parole). As a consequence, until this Court decides whether the Constitution requires that jurors be accurately informed about parole eligibility, there is a very real possibility that defendants throughout the country will be sentenced to death based upon constitutionally inadequate procedures and unreliable information. This Court should therefore grant certiorari and resolve this fundamental issue.[9]

4. On the merits, the decision below should be overturned for two reasons. First, as Justice Scalia recognized in dissent, the rule adopted in *Simmons* is "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness." *Simmons*, 114 S. Ct. at 2203 (Scalia, J., dissenting) (emphasis in original). If juries must be informed of a defendant's *permanent* parole ineligibility, *see, e.g.*, Va. Code Ann. § 53.1-151 (B1), App., *infra*, 33a (forbidding parole for individuals convicted of three violent felonies), then they must also be informed of a defendant's ineligibility for parole for a substantial period of time. Evidence of partial parole ineligibility is as relevant to future dangerousness as evidence of permanent

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[9] The defendant in *Allridge* has also petitioned this Court for a writ of certiorari to consider whether the Constitution guarantees criminal defendants the right to inform the jury of parole ineligibility for a number of years. *See* Petition for a Writ of Certiorari, *Allridge v. Collins*, No. 94-1522 (U.S. March 15, 1995) (question presented number three). The instant case, however, presents a better vehicle for considering that issue because it is not necessary here to consider whether *Simmons* announced a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). *See* Petition for a Writ of Certiorari, *Allridge v. Collins*, at 25-27.

ineligibility. Differences in the length and permanence of the ineligibility go to the weight of the evidence, not to its relevance. Moreover, it makes no sense to prevent a defendant such as Petitioner from rebutting a charge of future dangerousness simply because he has a chance — decades down the road — of obtaining parole under a life sentence.

Second, evidence of parole ineligibility must be admitted in order to ensure the reliability of a death sentence. Confusion over the actual length of a sentence of life imprisonment distorts the choice facing the jury and undermines the reliability of its decision to sentence a defendant to death rather than life imprisonment. As Justice Souter noted last Term, this confusion is inimical to the Eighth Amendment's "heightened standard for reliability in the determination that death is the appropriate punishment in a specific case," which requires that jurors be instructed on the proper meaning of sentencing terms whenever there is a reasonable likelihood of misunderstanding. *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring). Moreover, fundamental respect for humanity requires that defendants facing the death penalty be permitted to present the evidence that they consider mitigating. *See, e.g., Skipper v. South Carolina*, 476 U.S. at 8; *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Thus, the decision below is contrary both to the Eighth Amendment and the Due Process Clause. Petitioner is therefore entitled under Virginia law to a new sentencing hearing before a jury informed of his partial parole ineligibility. *See Mickens v. Commonwealth*, Nos. 931646 & 931647, 1995 WL 232822, at *1 (Va. April 21, 1995) (remanding for resentencing despite finding of vileness based on violation of *Simmons*).

III. THE COURT BELOW'S RULING ON THE "VILENESS" AGGRAVATING CIRCUMSTANCE CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS AND SQUARELY CONTRADICTS DECISIONS OF THIS COURT.

In *Godfrey v. Georgia*, 446 U.S. 420, this Court held that, absent a limiting construction, a Georgia statute subjecting criminal defendants to capital punishment for any offense that is "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim'" is unconstitutionally vague. *Id.* at 428, 433 (plurality opinion) (quoting Ga. Code § 27-2534.1(b)(7) (1978)). The Virginia capital sentencing statute contains a "virtually identical" aggravating factor. *Turner v. Williams*, 35 F.2d 872, 880 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1359 (1995). Nevertheless, the decision below summarily affirmed the vileness finding of a jury that was instructed based solely on the statutory language without any limiting construction. This decision is flatly inconsistent with this Court's decisions in *Godfrey* and subsequent cases, and conflicts with the decisions of numerous state courts. As a consequence, this issue should be reviewed as well.

The decisions of other state courts of final resort appear uniformly to contradict the decision below. At least twenty states employ a factor either identical to Virginia's vileness factor or based upon similar pejoratives such as "heinous" or "cruel."[10]

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[10] At least five states employ a vileness factor similar to Virginia's. *See* Del. Code Ann. tit. 11, § 4209(e)(1)(*l*) (Supp. 1994); Ga. Code Ann. § 17-10-30(b)(7) (1990); Mo. Ann. Stat. § 565.032(2)(7) (Vernon Supp. 1995); N.J. Stat. Ann. § 2c:11-3(c)(4)(c) (West Supp. 1994); S.D. Codified Laws Ann. § 23A-27A(1)(6) (1994). Another fifteen states make crimes that are heinous, cruel, atrocious, or depraved an aggravating factor. *See* Ala. Code § 13A-5-49(8) (Supp. 1994); Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1989); Cal. Penal Code § 190.2(a)(14) (West Supp. 1995); Colo. Rev. Stat. § 16-11-103(5)(j) (Supp. 1994); Conn. Gen. Stat. Ann. § 53a-46a(h)(4) (West 1994); Fla. Stat. Ann. § 921.141(5)(h) (West Supp. 1995); Idaho Code § 19-2515(g)(5) (1987);

In six of these states, the courts of final resort have held that, standing alone, such aggravating factors are unconstitutionally vague.[11] Another eleven states have upheld findings of vileness or heinousness based on the use of a limiting construction either at trial or on appeal.[12] *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 364-65 (1988) (noting that a "heinousness" factor construed to require acts of "torture or serious physical abuse"

Ill. Ann. Stat. ch. 38, § 9-1(b)(7) (Smith-Hurd Supp. 1995); La. Code Crim. Proc. Ann. art. 905.4(A)(7) (West Supp. 1995); Miss. Code Ann. § 99-19-101(5)(h) (1994); Nev. Rev. Stat. Ann. 200.033(8) (Michie Supp. 1993); N.H. Rev. Stat. Ann. § 630:5(VII)(h) (Supp. 1994); N.C. Gen. Stat. § 15A-2000(e)(9) (1994); Okla. Stat. Ann. tit. 21, § 701.12(4) (West 1983); Wyo. Stat. § 6-2-102(h)(vii) (1994).

[11] *See Wilson v. State*, 751 S.W.2d 734, 736, 739 (Ark.) (finding an aggravating factor that "permits the jury to consider whether '[t]he capital murder was committed in an especially heinous, atrocious, or cruel manner'" to be "too broad and vague to be sustained") (quoting Ark. Code Ann. § 5-4-603(8)), *modified*, 752 S.W.2d 762 (Ark. 1988); *People v. Davis*, 794 P.2d 159, 176 (Colo. 1990) (en banc); *State v. Breton*, 562 A.2d 1060, 1064 (Conn. 1989); *In re Petition of State for Writ*, 433 A.2d 325, 325-26 (Del. 1981); *Libby v. State*, 859 P.2d 1050, 1058 (Nev. 1993); *James v. State*, 818 P.2d 918, 921 (Okla. Crim. App. 1991), *cert. denied*, 502 U.S. 1111 (1992).

[12] *See State v. Richmond*, 886 P.2d 1329, 1332 n.1 (Ariz. 1994) (en banc) (finding a heinousness factor "adequately narrowed pursuant to *Godfrey v. Georgia*") (citation omitted); *People v. Mincey*, 827 P.2d 388, 416 (Cal.) (in bank), *cert. denied*, 113 S. Ct. 637 (1992); *Smalley v. State*, 546 So.2d 720, 722 (Fla. 1989); *Taylor v. State*, 404 S.E.2d 255, 263 (Ga.), *cert. denied*, 502 U.S. 947 (1991); *State v. Osborn*, 631 P.2d 187, 200 (Idaho 1981); *State v. Deboue*, 552 So.2d 355, 367 & n.11 (La. 1989), *cert. denied*, 498 U.S. 881 (1990); *Conner v. State*, 632 So.2d 1239, 1270-71 (Miss. 1993), *cert. denied*, 115 S. Ct. 314 (1994); *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. 1993) (en banc), *cert. denied*, 114 S. Ct. 1664 (1994); *State v. Ramseur*, 524 A.2d 188, 226, 276 (N.J. 1987); *State v. Syriani*, 428 S.E.2d 118, 141 (N.C.), *cert. denied*, 114 S. Ct. 392 (1993); *Hopkinson v. State*, 632 P.2d 79, 154 (Wyo. 1981).

would be constitutionally acceptable). Thus, a square conflict exists, with Virginia apparently the only State to hold that a finding of "vileness" may be upheld without any limiting construction.

The near-unanimity of the lower courts is a reflection of the clear guidance given by this Court in *Godfrey* and subsequent cases. In *Godfrey*, the trial judge instructed the jury on the vileness factor by quoting the statutory language. *See* 446 U.S. at 426 (plurality opinion). On appeal, the Georgia Supreme Court "simply asserted that the verdict was 'factually substantiated.'" *Id.* at 427, 432. This Court reversed. It found that the Georgia courts had not applied their limiting construction of the vileness factor, which requires either acts of torture or battery, or a state of mind that would lead a murderer to torture, or commit an aggravated battery before killing, his victim. *See id.* at 431-32. As a consequence, the jury was left with no guidance in determining whether the murder in question was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Finding that "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman,'" this Court held that the Georgia Supreme Court's summary affirmance of the jury's findings did not cure the "uncontrolled discretion of a basically uninstructed jury." *Id.* at 419-20, 429-33; *see also id.* at 435 (Marshall, J., concurring) (agreeing with the plurality that, as applied, the vileness factor was unconstitutionally vague).

Since *Godfrey*, this Court has repeatedly recognized that "pejorative adjectives such as . . . 'outrageously or wantonly vile, horrible and inhuman,'" standing alone, are unconstitutionally vague. *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993); *see Tuilaepa v. California*, 114 S. Ct. 2630, 2636 (1994); *Richmond v. Lewis*, 113 S. Ct. 528, 534 (1992); *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992). *Walton v. Arizona*, 497 U.S. 639, 653-54 (1990); *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Maynard v. Cartwright*, 486 U.S. at 363-64. Moreover, relying upon

Godfrey, this Court has on three occasions held similar aggravating factors to be unconstitutionally vague. *See Richmond v. Lewis*, 113 S. Ct. at 534 (holding a statutory heinousness factor unconstitutionally vague); *Shell v. Mississippi*, 498 U.S. at 1; *id.* at 3 (Marshall, J., concurring) (finding a limiting instruction unconstitutionally vague because there was "no meaningful distinction" between that instruction and the vileness instruction in *Godfrey*); *Maynard v. Cartwright*, 486 U.S. at 363-64 (invalidating a heinousness factor because it "gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*"). Indeed, just last Term, this Court observed that "there is no serious argument that [such factors are] not facially vague." *Richmond v. Lewis*, 113 S. Ct. at 534 (quotation omitted).

The decision below squarely conflicts with this Court's decisions in *Godfrey* and subsequent cases, as well as with the otherwise unanimous weight of lower court authority. The material facts in this case and in *Godfrey* are identical. As the Virginia Supreme Court has acknowledged, the statutory language defining Virginia's vileness factor "is the same as that in the Georgia statute." *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979). Moreover, as in *Godfrey*, the trial judge instructed the jury merely by quoting the statutory language, 1 Tr. 193, 4 Tr. 1557-58, and the Virginia Supreme Court affirmed based upon prior precedent without applying a limiting construction. *See* App., *infra*, 5a. More fundamentally, absent a limiting construction, Virginia's vileness factor is simply a series of pejorative adjectives of the sort that this Court's post-*Godfrey* decisions have consistently found too vague to satisfy the Eighth and Fourteenth Amendments.

Accordingly, this Court should review the refusal of the court below to follow this Court's decision in *Godfrey*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 12, 1995

APPENDIX

APPENDIX A

SUPREME COURT OF VIRGINIA

Michael Wayne WILLIAMS

v.

COMMONWEALTH of Virginia.

Record No. 940445

Nov. 4, 1994

R. Donald Ford, Jr. (Lucretia A. Carrico, Hayes & Carrico, on brief), for appellant.

Donald R. Curry, Sr. Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: COMPTON, STEPHENSON, WHITING, LACY, HASSELL and KEENAN, JJ., and HARRISON, Retired Justice.

WHITING, Justice.

Michael Wayne Williams was tried upon indictments charging him with 12 felonies arising out of the February 27, 1993, murders of Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, in Cumberland County. Five indictments charged Williams with the capital murders of Mr. and Mrs. Keller, two of which charged their murders in the course of a robbery while armed with a deadly weapon, Code § 18.2-31(4), two of which charged the Kellers' murders subsequent to the rape of Mrs. Keller, Code § 18.2-31(5), and the fifth indictment charged the killing of the Kellers as a part of the same act or transaction, Code § 18.2-31(7). The seven remaining indictments charged Williams with Mrs. Keller's rape, the burglary and arson of Mr. Keller's house, and the robberies and abductions of the Kellers.

In the first stage of a bifurcated trial conducted pursuant to Code §§ 19.2-264.3 and -264.4, a jury convicted Williams of all 12 charges and fixed his punishments on the non-capital convictions.

In the second stage of the trial of the capital murder charges, the jury fixed Williams's punishments for the capital murder of Mrs. Keller at death and for the capital murder of Mr. Keller at death, based on its findings of "future dangerousness" and "vileness." The court then referred the matter to the probation officer for an investigation and report pursuant to the provisions of Code § 19.2-264.5. After considering the probation officer's report, the court imposed the jury sentences.

Williams appeals only his capital murder convictions. We have consolidated his appeal with our automatic review of his death sentence under Code § 17- 110.1(A).

I. EVIDENCE

A substantial part of the Commonwealth's evidence comes from the testimony of Jeffrey Alan Cruse, Williams's confederate in these crimes. Pursuant to established principles of appellate review, we will view the evidence and all reasonable inferences arising therefrom in the light most favorable to the Commonwealth, the prevailing party at trial.

Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the

Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait ... [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample.

Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

II. ISSUES PREVIOUSLY DECIDED

Williams raises a number of issues that we have previously decided adversely to his contentions. Williams offers no persuasive reasons to modify our previous conclusions, and we perceive none. Hence, we will adhere to our previous rejections of those contentions and will not discuss them beyond citing representative cases expressly rejecting these contentions. The first group of contentions involves Williams's claims of the unconstitutionality of the capital murder and death penalty statutes for the following reasons:

A. The statutes do not give meaningful guidance to a jury because they do not require the jury to find that aggravating circumstances outweigh mitigating ones before fixing the death penalty. Rejected in *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 674-75 (1994), and *Mickens v. Commonwealth*, 247 Va. 395, 403, 442 S.E.2d 678, 684 (1994).

B. As written and administered, the statutes fail to adequately inform the jury that a death sentence may be imposed only upon a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating ones. Rejected in *Watkins v. Commonwealth*, 229 Va. 469, 490-91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986).

C. The statutes fail to provide the sentencer with sufficient guidance as to aggravating factors to assure that the death penalty is not imposed in an arbitrary and capricious manner. Rejected in *Mickens*, 247 Va. at 402-403, 442 S.E.2d at 683-84.

D. The "future dangerousness" aggravating factor in the statutes is inherently misleading since it asks jurors to find a probability beyond a reasonable doubt. Rejected in *Mickens*, 247 Va. at

402-403, 442 S.E.2d at 684; *M. Smith v. Commonwealth*, 219 Va. 455, 477-78, 248 S.E.2d 135, 148- 49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

E. That part of the statute, Code § 19.2-264.4(C), which allows the sentencer to find the "future dangerousness" predicate based on unadjudicated criminal conduct, violates the Eighth and Fourteenth Amendments. Additionally, if evidence of such conduct is admissible, the jury should have been instructed that it could only be considered if established beyond a reasonable doubt. Both contentions are rejected in *Breard*, 248 Va. at 74-75, 445 S.E.2d at 675, and in *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993).

F. The "future dangerousness" aggravating factor in the statutes is inherently unreliable and is insufficient to guide jury discretion. Rejected in *Satcher*, 244 Va. at 227, 421 S.E.2d at 826, and *M. Smith*, 219 Va. at 477-78, 248 S.E.2d at 148-49.

G. The statutes as administered are unconstitutional because the infrequency of the imposition of the death penalty indicates that it is imposed arbitrarily and disproportionately upon black defendants, and the death penalty is repugnant to evolving standards of decency. Rejected in *Satcher*, 244 Va. at 228, 421 S.E.2d at 826.

H. As applied, the statutes are unconstitutional because they deny "meaningful appellate review and there is arbitrary administration of the state created right to proportionality and passion/prejudice review." Rejected in *Mickens*, 247 Va. at 405, 442 S.E.2d at 685.

I. Additionally, Williams argues in conclusional fashion that the statutes violate the Eighth Amendment prohibition against cruel and unusual punishment, the Sixth Amendment right to a fair trial, and the Fourteenth Amendment prohibition against deprivation of a defendant's life without due process. We have rejected each of these claims in the following cases: *Beaver v. Commonwealth*, 232 Va. 521, 527, 352 S.E.2d 342, 345-46, *cert.*

denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (claim of cruel and unusual punishment); *Boggs v. Commonwealth*, 229 Va. 501, 514, 331 S.E.2d 407, 417 (1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986) (claim of denial of Sixth Amendment right to fair trial); and *Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980) (claim of lack of due process).

Williams's second group of contentions that have been previously rejected by this Court involves the following:

A. The court erred in denying his motions for individual and sequestered voir dire examination of prospective jurors and for additional peremptory juror challenges. Rejected in *Breard*, 248 Va. at 75, 445 S.E.2d at 675, and *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200 (1994).

B. The court erred in failing to provide additional discovery beyond that required under Rule 3A:11. Rejected in *Spencer v. Commonwealth*, 238 Va. 295, 303-304, 384 S.E.2d 785, 791-92 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990).

III. ISSUES PROCEDURALLY DEFAULTED

We will not consider Williams's present objections to the exclusion of prospective jurors Thomas J. Langhorne, Bobbie Holman, and Mary D. Trent because Williams did not object to their exclusion at trial. Rule 5:25. Nor will we consider Williams's present objections to the court's grant and refusal of certain penalty phase jury instructions because the record does not indicate that Williams objected to these actions by the court. *Id.*

IV. WAIVER OF CERTAIN CONTENTIONS

Williams did not brief, and has therefore waived, assignments of error 10 and 24. Rule 5:27(e).

Also, in his brief, Williams attempts to "incorporate by reference" a number of arguments he made in the trial court for

consideration on appeal. We will not consider these arguments since they must be made in the appellate briefs. See *Mickens*, 247 Va. at 401 n. 4, 442 S.E.2d at 683 n. 4, and *Jenkins v. Commonwealth*, 244 Va. 445, 460-61, 423 S.E.2d 360, 370 (1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993) (arguments made in trial court cannot be considered on appeal merely by reference thereto in appellate brief).

V. PRETRIAL MOTIONS

Motion for Bill of Particulars

Williams filed a motion for a bill of particulars seeking, among other things, to require the Commonwealth to "identify every narrowing construction of [the "vileness"] factor on which it intends to offer evidence." The death penalty may be imposed if the defendant's "conduct in committing the offense [punishable by death] was outrageously or wantonly vile, horrible or inhuman, *in that it involved torture, depravity of mind or aggravated battery to the victim.*" Code § 19.2-264.4(C) (emphasis added). The necessary narrowing constructions are contained in the emphasized language of Code § 19.2- 264.4(C). See *M. Smith*, 219 Va. at 478, 248 S.E.2d at 149 ("depravity of mind" and "aggravated battery" construed).

However, Williams contends that due process requires his pretrial notification of every one of these constructions upon which the Commonwealth will rely at trial. Williams makes this same argument in support of his contention that the "vileness" predicate in the death penalty statutes is unconstitutional.

We find no merit in his arguments. In our opinion, due process does not require that the Commonwealth limit itself to a pretrial construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S.

____, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991); *Spencer v. Commonwealth*, 238 Va. at 303- 304, 384 S.E.2d at 791.

Motion for Change of Venue

Williams contends that the court should have granted his motion for change of venue because of the prejudicial pretrial publicity of (1) Cruse's account of the Keller murders, and (2) four other recent murders in which Williams was allegedly involved. Those murders had occurred on December 24, 1992, in the nearby town of Rice, which is in Prince Edward County. The bodies of four men were discovered in the ruins of the house where they were shot. The house apparently had been deliberately burned following their murders.

Williams has the burden of showing that there was widespread prejudice against him in Cumberland County which would be "reasonably certain to prevent a fair trial." *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388, *cert. denied*, ____ U.S. ____, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The decision whether to grant a change of venue is within the sound discretion of the trial court, and such decision will not be disturbed on appeal absent an abuse of that discretion. *Id.*

Williams does not claim, nor does the record disclose, that the pretrial publicity was inaccurate or that it was difficult to empanel the jury. And of the 37 prospective jurors who were examined, only 4 were required to be excused because they had formed an opinion of Williams's guilt based on the pretrial publicity. Given these circumstances, we find no abuse in the court's discretion in denying Williams's motion for a change of venue.

Motion for Assistance of Private Investigator

Williams, an indigent, contends that the court erred in denying his pretrial motion for the appointment of a private investigator to assist his counsel in his defense. Williams asked the court to delay a ruling on that motion until he was furnished with information that the Commonwealth was to produce in response

to his discovery motions. When Williams sought a ruling after completion of discovery, his request was confined to (1) an investigator's assistance in procuring information regarding a change of venue, and (2) mitigation evidence.

However, on appeal, Williams argues that this assistance was required to investigate (1) Cruse's credibility, and (2) the evidence of the Prince Edward County crimes which would be considered in the penalty phase on the issue of Williams's future dangerousness. We will not consider Williams's present arguments because they were not made in the trial court. Rule 5:25.

VI. JURY SELECTION

Limitation of Voir Dire

Williams argues that the court improperly limited his voir dire examination by refusing to permit him to ask prospective jurors about their "perceptions on parole law." Williams concedes that he was not ineligible for parole when this case was tried. Accordingly, the trial court ruled correctly that Williams was not allowed to inject issues of parole in his voir dire questions. *Ramdass v. Commonwealth*, 248 Va. ____, ____, 450 S.E.2d 360, 361 (this day decided); *Wright v. Commonwealth*, 248 Va. ____, ____, ____ S.E.2d 361, 362 (this day decided).

Retention and Exclusion of Prospective Jurors

Gary Davis

Williams contends that the trial court applied the wrong standard in refusing to disqualify prospective juror Davis. During voir dire, Davis said that it would be "tough" to "overlook the death penalty" and impose a life sentence if the Commonwealth proved the aggravating circumstances. According to Williams, the trial court "erroneously applied a standard which would disqualify prospective jurors only if they would automatically vote for the death penalty."

However, Williams voiced no such contention in the trial court. Accordingly, we will not consider this contention on appeal. Rule 5:25.

Sharon Barrett Baldwin

Williams complains that the court erroneously excluded prospective juror Baldwin. In deciding whether to exclude a prospective juror, the trial court must determine whether the prospective juror's views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)), *cert. denied*, ____ U.S. ____, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). And, in considering this matter on appeal, we defer to the trial court's decision because the trial judge has seen and heard the prospective jurors and is in a better position than we are to rule on these issues. *Breard*, 248 Va. at 77, 445 S.E.2d at 676. Accordingly, we will not reverse the ruling on appeal in the absence of a showing of "manifest error." *Eaton*, 240 Va. at 246, 397 S.E.2d at 391.

Baldwin testified that she would automatically refuse to impose the death penalty because of her religious beliefs, and that she would not consider the court's directions to consider a death sentence as well as a "life" sentence. Her final answer was that she "would have a very, very hard time [considering the death penalty]." Considering Baldwin's expression of her religious beliefs and her apparent reluctance to consider the court's directions, we find no manifest error in excusing her.

VII. GUILT PHASE

Failure to Grant Mistrial

Verena James testified that she had received a monetary reward for supplying evidence about the Keller fire. She was then asked if she knew of such a reward before she supplied her information to the police. She responded, "No. Through the media I had

heard about the Rice fires." This unresponsive answer was an apparent reference to the four recent murders and the arson of the house in Rice.

According to Williams, this information "impermissibly placed before the jurors, at the guilt phase of the trial, the unadjudicated acts of murder." However, there is no contradiction in the record of the trial court's observation that "[n]othing was said about connecting this gentleman with anything about the Rice fires."

Moreover, Williams declined the court's offer to instruct the jury to disregard that testimony. Under these circumstances, we find no abuse of discretion in the court's refusal to declare a mistrial.

Admission of Photographs of Victims and Crime Scene

Williams complains of the allegedly excessive and, therefore, prejudicial number of photographs of the Kellers' bodies at the scene of their murders. Six photographs, some taken from a distance and others taken from a point closer to the bodies, all with different views of the bodies, were introduced in evidence.

The well-established rule is that admission into evidence of "photographs depicting victims and the crime scene is a matter resting within the sound discretion of the trial court." *Breard*, 248 Va. at 82, 445 S.E.2d at 678. We find no abuse of that discretion in the admission of these photographs.

Alleged Errors During Cruse's Testimony

Williams contends that the trial court erred in three rulings during Cruse's testimony. We find no merit in any of these contentions.

First, Williams contends that by allowing Cruse to testify on direct examination that he had no plea agreement with the Commonwealth in exchange for his testimony, the court improperly permitted the Commonwealth "to bolster" Cruse's testimony on direct examination. Williams correctly points out that ordinarily evidence of a witness's credibility is not admissible

until the witness's credibility is attacked. *See Jordan v. Taylor*, 209 Va. 43, 48-49, 161 S.E.2d 790, 794 (1968) (improper to elicit testimony from witness tending to bolster that witness's credibility).

However, the order of proof in a trial is a matter committed to the sound discretion of the trial court, and we will not reverse a ruling varying the order of proof in the absence of an abuse of discretion. *Quintana v. Commonwealth*, 224 Va. 127, 142, 295 S.E.2d 643, 650 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983) (sustaining admission of evidence in rebuttal phase of case more appropriately admissible in case-in-chief); *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814, 817 (1978) (permitting Commonwealth to reopen case after it rested and court heard defendant's motion to strike Commonwealth's evidence). Since Williams advised the court that he planned to attack Cruse's credibility, we find no abuse of that discretion in this case.

Next, Williams argues that the court erred in admitting part of Cruse's testimony. Cruse had testified on direct examination that he was being prosecuted for capital murder arising from the Keller incidents. On cross-examination, Cruse was asked whether he was testifying "to help [him]self in making [his] case." Cruse responded, "I'm getting it off my chest." Cruse was then asked whether he was "also getting the death penalty off [his] back." Cruse simply responded, "Not really."

Over Williams's objection, Cruse testified on redirect examination that he was unable to look at the pictures of the murder scene because he "lost it." In our opinion, evidence that Cruse was upset by the pictures was appropriate corroboration of his testimony that he wanted to "get it off [his] chest," and, therefore, proper rebuttal to the suggestion that he was "getting the death penalty off [his] back."

Williams's final contention regarding Cruse's testimony is that the court erred in refusing to permit Williams to show Cruse's conviction of an assault and battery. Williams recognizes that because misdemeanor assaults and batteries are not crimes of

moral turpitude, evidence of convictions of those crimes is not admissible to attack a witness's credibility. *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961). However, because he claims that Cruse's credibility and "proclivity for assaultive behavior was a crucial factor for the jury to decide," Williams contends that this evidence should have been admitted. However, he cites no supporting authority.

Clark states the applicable rule:

> The rule is well settled in Virginia that a witness cannot be asked on cross examination questions as to collateral independent facts irrelevant to the issue being tried, though bearing on the question of veracity, for the purpose of testing his credibility.

Id. at 789, 120 S.E.2d at 272. We see no reason to create the suggested exception to this rule. Cruse admits he fired the first shot at Mrs. Keller, thereby virtually eliminating any doubt of his "proclivity for assaultive behavior." Accordingly, the trial court correctly excluded this testimony as an inadmissible attack upon Cruse's credibility.

Testimony of Tammy Lynn Tolley

Williams maintains that the court erred in the manner in which it permitted Tammy Lynn Tolley to identify him as one of the two men from whom she bought some of the Kellers' property on the day after the Kellers were murdered. When Tolley began testifying, she could not identify Williams by looking at persons in the courtroom. However, over Williams's objection, she identified a photograph of him that had been shown to her shortly after she had bought some of the stolen property.

Later, while responding to a question on another subject, Tolley volunteered, "That's the guy right over there. I didn't see him sitting over there." The Commonwealth's attorney responded, "After looking at him, she identified him," and Tolley said, "I mean, I looked out there. I didn't look up here."

We do not agree with Williams's contention that this was another effort "to rehabilitate" the witness prior to cross-examination. Rather, it was a permissible examination to establish that, on a prior occasion, Tolley had identified Williams as one of the men from whom she bought some of the Kellers' property.

Alleged Improper Cross-Examination of Williams

The witnesses had been excluded from the courtroom when not testifying. Williams contends that the trial court erred in permitting the Commonwealth to ask Williams on cross-examination whether he was the only witness who had been present in the courtroom and heard the testimony of witnesses who had already testified.

According to Williams, this question "impermissibly burdened Williams' [constitutional] right to confront his accusers, to be present at all times during his trial, to present evidence in his favor and to compel process." However, Williams cites no case in which such a question has been held to violate a defendant's constitutional rights, and we find none. We fail to see how those rights are violated by a question that reflected what the jury already knew. Accordingly, we find no merit in this contention.

Admission of Williams's Out-of-Court Statement

Officer John Richard Holt brought Williams back to Cumberland County from Georgia, where Williams was arrested. During the return trip, Holt answered a number of Williams's questions.

Holt testified during the Commonwealth's case-in-chief that in response to Williams's questions, Holt told Williams that the Black Hawk revolver had been recovered from the Rappahannock River. When Williams later asked what Cruse had told the police about the Keller incidents, and Holt said that Cruse had "told us the whole story," Williams responded, "I can prove Jeff had that goddamn Black Hawk."

Williams contends that the court erred in permitting the last out-of-court hearsay statement by Williams. We disagree.

Although Williams may have thought that his statement was exculpatory, the statement linked him to the Keller incidents and was thus admissible as a party admission exception to the hearsay rule. *Stewart v. Commonwealth*, 245 Va. 222, 236, 427 S.E.2d 394, 403, *cert. denied*, ____ U.S. ____, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993) (statement to witness prior to defendant's wife's murder that defendant had consulted counsel regarding divorce admissible under party admission exception to hearsay rule).

Instructions

Williams contends that the court erred in granting Instruction 18 which told the jury that: You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal shooting, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

In *Strickler*, we noted that "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." 241 Va. at 495, 404 S.E.2d at 235. However, Williams contends that Strickler is distinguishable from this case because in *Strickler* two persons used a heavy rock to kill the victim. Here, Williams notes that "the deaths were caused by a firearm which only requires the action of one person in pulling the trigger."

However, Williams overlooks Cruse's testimony that both he and Williams shot Mrs. Keller in the head, that Cruse used the Black Hawk revolver, and that Williams used the .38 caliber handgun. He also overlooks the testimony of Dr. Kay. Although Dr. Kay testified that any one of Mrs. Keller's three facial wounds "could" have been lethal, she concluded in her autopsy report that Mrs. Keller's death was caused by three "[g]unshot wounds of face."

Accordingly, the jury could have found from the evidence that Williams and Cruse each took a direct part in inflicting

Mrs. Keller's fatal injuries. Hence, the instruction was proper for that reason.

Next, in assignment of error 28, Williams contends that the court erred in refusing his tendered Instructions 19 and 20. However, he merely "incorporates by reference" the argument he made in the trial court in support of his present contention. As we have noted earlier, we will not consider arguments presented in the trial court that are simply incorporated by reference in an appellate brief. Accordingly, Williams has waived this contention.

Sufficiency of Evidence

Williams maintains that the evidence is insufficient in several respects to support his convictions for capital murder. First, he claims that Cruse killed Mrs. Keller with the first shot. However, as we have noted earlier, Dr. Kay's testimony was sufficient to indicate that Mrs. Keller was killed by the combination of the three shots to her face.

Next, Williams argues that the evidence is insufficient to show that he killed Mr. Keller since Mr. Keller stood up after Williams shot him. However, even if Williams did not kill Mr. Keller on the first shot, the jury could have found that Williams did so later when, according to Cruse, Williams fired the remaining shots into Mr. Keller's body.

Thus, in our opinion, there is sufficient evidence to support the jury's finding that Williams had actively participated in the murders of both Mr. and Mrs. Keller. Additionally, the evidence amply supports the factual finding that Williams killed both Kellers as a part of the same acts or transactions of robbing them and raping Mrs. Keller.

As his final argument on the sufficiency of the evidence, Williams contends that the "predicate felonies of rape and robbery were not sufficiently close in time and place to the murders of Mr. and Mrs. Keller to elevate those murders to capital murder." We disagree.

The evidence indicates that Williams and Cruse went to the Kellers' house intending to rob them and, while committing the robbery, they raped Mrs. Keller. The evidence also shows that they killed the Kellers because Williams "didn't want to leave no witnesses." In our opinion, this evidence amply supports the conclusion that the robberies, the rape, and the subsequent murders were "so closely related in time, place, and causal connection as to make the killing[s], as a matter of law, a part of the same criminal enterprise." *Briley v. Commonwealth*, 221 Va. 532, 544, 273 S.E.2d 48, 56 (1980), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

Additionally, one of the specifically defined acts of capital murder is the "willful, deliberate, and premeditated murder of any person, in the commission of, or subsequent to, rape." Code § 18.2-31(5). There is no doubt that the Kellers were murdered shortly after Mrs. Keller's rape. Accordingly, we conclude that the evidence is sufficient to sustain Williams's capital murder convictions.

Alleged Double Jeopardy Violation

Williams contends that he was put in double jeopardy by his conviction of five charges of capital murder when only two people had been killed, thereby violating the proscriptions against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, Article I, Section 8 of the Virginia Constitution, and Code § 19.2-294. We disagree.

We need not consider whether Williams was charged with multiple offenses arising from the same act or offense since he was prosecuted for those offenses in the same trial. *Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 798 (1981). We are concerned only with his constitutional and statutory rights not to be subjected to multiple punishments for the same act or offense. *Thomas v. Commonwealth*, 244 Va. 1, 9, 419 S.E.2d 606, 610, *cert. denied*, ___ U.S. ___, 113 S.Ct. 421, 121 L.Ed.2d 343 (1992). Here, although Williams was convicted of five charges of capital murder, each based separately upon proof beyond a reasonable doubt, the jury fixed only one death sentence

for each victim. Under these circumstances, Williams was not subjected to multiple punishments for what he claims was the same act or offense. *Id.*

VIII. PENALTY PHASE

Admission of Photographs of Other Murders

Williams confessed to John Howard Williams, his brother, that he had shot and killed the four men and set fire to the house in Rice. The court permitted the Commonwealth to introduce photographs of each victim's head showing that each had been shot in the head and that parts of the head were partially burned.

The Commonwealth claimed that the photographs were relevant not only to establish Williams's future dangerousness by indicating the atrociousness of the Prince Edward County murders, but also to corroborate the testimony of John Williams as to Williams's confession to him. The court admitted the photographs over Williams's objection that the four victims' autopsy reports, which were admitted in evidence, showed the same things that the photographs did and that the photographs were inflammatory. The parties make the same arguments on appeal.

The fact that the autopsy reports reflect the same facts as the photographs does not make the photographs inadmissible. *See Spencer*, 238 Va. at 312, 384 S.E.2d at 796 (even though videotape of crime scene admitted in evidence, still photographs of crime scene also admissible). And the decision whether to admit photographic evidence of the crime establishing the same facts as another exhibit is within the sound discretion of the trial court. *Id.* at 312, 384 S.E.2d at 796. We think that the photographs were relevant for the reasons advanced by the Commonwealth, and we find no abuse of the trial court's discretion in admitting them in evidence.

Passion, Prejudice, or Other Arbitrary Factor

Williams argues that the introduction of "[t]he pictures of the charred bodies of the victims of the Prince Edward [County]

killings" inflamed the jury so that "there was no question but that the jury would impose the death penalty after viewing them." However, we find nothing in the record to indicate that the jury disregarded the trial court's instruction to consider the photographs only for the purpose of showing Williams's "future dangerousness" in deciding the Cumberland County case.

Additionally, Williams claims that "the passion and prejudice of the jury were further aroused by the Commonwealth's calling family members to testify during the sentencing hearing." We note that Mary Carter Williams, Mrs. Keller's mother, was the only family member called as a witness by the Commonwealth during the sentencing hearing. Mrs. Williams testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers. The record does not disclose that Mrs. Williams displayed any particular emotion during the short period of her testimony.

Williams concludes that this was an indirect method of introducing inadmissible victim impact evidence, although Williams voiced no objection whatever to Mrs. Williams's testimony. We do not consider the testimony to have been victim impact evidence, nor does the record disclose that it aroused the passion of the jury, as Williams contends.

Next, Williams suggests that the sentence was influenced by passion, prejudice, or other arbitrary factors because the jury imposed the death penalty despite his mitigating evidence. This evidence indicated that Williams suffered from a childhood mental disorder known as Attention Deficit Hyperactivity Disorder (A.D.H.D.), which adversely affected him in school and limited his ability to function in society as he matured. Dr. Dewey G. Cornell, a clinical psychologist, testified that persons suffering from A.D.H.D. are likely to be involved in substance abuse and engage in impulsive and sometimes illegal behavior.

Noting his own history, Williams contends that the effects of his disorder were exacerbated by his unstable home life and a sexual assault by an older man when Williams was 14 years old. Williams's mother, Carolyn Green Lipscomb, divorced his father

shortly before he was born and married Arthur Williams, an alcoholic. Lipscomb divorced Arthur Williams after several years of verbal and emotional abuse. Thereafter, Lipscomb had several "relationships" with men, and Lipscomb testified that "not all [were] pleasant." However, one of those men, Dwayne Copeland, had a good "relationship" with Lipscomb, and she and Copeland planned to be married. When Copeland was killed in an automobile accident a few months before the planned marriage, Lipscomb testified that Williams was "devastated."

Williams points out that despite these difficulties, the testimony of his family members indicated that he was a caring, loving, generous, and dependable person who was not seen to be cruel or abusive to animals or to people. We have reviewed all of Williams's mitigating evidence and find nothing in it that would compel the jury to impose life sentences rather than death sentences.

Independent of Williams's specific complaints on this subject, we have also reviewed the record, as required by Code § 17-110.1, to ascertain if there is any indication that the jury, in imposing the death sentence, was influenced by passion, prejudice, or any other arbitrary factor. Our independent review discloses no such indication.

Proportionality

As required by Code § 17-110.1(C)(2), we also consider whether Williams's "death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the criminal." Prior to the Prince Edward County murders, Williams had no convictions for violent crimes, but he had several felony convictions for automobile theft and for possession of marijuana. However, we must also consider that Williams was the sole participant in the Prince Edward County murders and arson. Further, Williams suggested the robberies, the rapes, the execution-type killings of the Kellers, and the arson of their house. In our opinion, this evidence amply justifies the jury's finding of the "vileness" of the Keller murders and of Williams's "future dangerousness."

To assist us in our proportionality review, we have considered the compilation of the records of all capital murder cases reviewed by this Court pursuant to Code § 17-110.1(E). We have paid particular attention to those cases in which the death sentence was based on both the "vileness" and the "future dangerousness" predicates. These cases are collected in *Spencer*, 238 Va. at 319-20, 384 S.E.2d at 799-800. We have collected the cases since *Spencer in Mueller*, 244 Va. at 413-14, 422 S.E.2d at 397. Since Mueller, the following cases have imposed death sentences based on both predicates: *Commonwealth v. Burket*, 248 Va. ___, 450 S.E.2d 124 (this day decided); *Breard*, 248 Va. at 89, 445 S.E.2d at 682; and *Mickens*, 247 Va. at 412, 442 S.E.2d at 689.

Based upon our review of these records, as well as of cases in which life sentences were imposed, we conclude that Williams's death sentences are not excessive or disproportionate to the penalties imposed by other sentencing bodies in Virginia for similar conduct, considering both the crimes and the defendant.

IX. CONCLUSION

We find no reversible error in the judgments of the trial court, and we perceive no other reason to set aside the sentences of death. Accordingly, we will affirm the convictions and sentences involved in these appeals.

Affirmed.

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 13th *day of* January, 1995.

Michael Wayne Williams, Appellant,

against Record No. 940445
Circuit Court No. F-143

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of November, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

Chief Justice Carrico took no part in the consideration or decision in this case.

A Copy,

Teste:

/s/ David B. Beach

Clerk

APPENDIX C

Virginia:

In the Circuit Court of Cumberland County, March 14, 1994.
Commonwealth of Virginia

Vs. Order - Felonies Case No. F-144

Jeffrey Alan Cruse
SSN: 315-76-3445
Birth Date: 12-22-67
Offense Date: 2-27-93
Judge: J. R. Snoddy, Jr.

Attorneys for the Commonwealth: Robert G. Woodson, Jr.
Warren Von Schuch

Attorneys for the Defendant: Donald C. Blessing
Lee R. Harrison

Commencing Status of Defendant: In custody

This day came the Attorneys for the Commonwealth, Robert G. Woodson, Jr. and Warren Von Schuch, and Jeffrey Alan Cruse, who stands indicted for felonies, to-wit: unlawfully and feloniously, on or about the 27th day of February, 1993, robbing Morris C. Keller, Jr. of money, guns, VCR, television, microwave, various jewelry and other tangible personal property (Code Section 18.2-58); unlawfully and feloniously, on or about the 27th day of February, 1993, raping Mary Elizabeth Keller (Code Section 18.2-61); willfully, deliberately, and with premeditation, on or about the 27th day of February, 1993, feloniously, killing and murdering Mary Elizabeth Keller subsequent to raping Mary Elizabeth Keller (Code Section 18.2-31(5); feloniously on or about the 27th day of February, 1993, killing and murdering Morris C. Keller, Jr. (Code Section 18.2-32); unlawfully and feloniously and maliciously, on or about the 27th day of February, 1993, in the nighttime, burning the dwelling house of Morris C. Keller, Jr., in which Morris C.

Keller, Jr. and his wife, Mary Elizabeth Keller, usually dwelled (Code Section 18.2-77); and came also Donald C. Blessing and Lee R. Harrison, his attorneys.

Whereupon the Attorneys for the Commonwealth moved the Court to amend the indictment charging that the defendant did feloniously, kill and murder Morris C. Keller, Jr. (Code Section 18.2-32) to, did, as a principal in the second degree, feloniously, kill and murder Morris C. Keller, Jr. (Code Section 18.2-32), which motion was granted by the Court.

Whereupon the accused was arraigned and after private consultation with and being advised by his counsel, pleaded guilty to the indictments, which pleas were tendered by the accused in person.

Whereupon the Attorneys for the Commonwealth presented a stipulation of facts in which the defendant and his counsel concurred, which was made a part of the record in this case, and the Attorneys for the Commonwealth also made a motion to incorporate by reference the evidence in the case of Commonwealth of Virginia vs. Michael Wayne Williams, which motion was granted by the Court.

Thereupon the Court, having made inquiry and being of the opinion that the defendant fully understood the nature and effect of his pleas and of the penalties that may be imposed upon his conviction and of the waiver of trial by jury and of appeal, and finding that his pleas were voluntarily and intelligently made, proceeded to hear and determine the case, and having heard the evidence and argument of counsel, the Court finds the accused guilty of unlawfully and feloniously, on or about the 27th day of February, 1993, robbing Morris C. Keller, Jr. of money, guns, VCR, property (Code Section 18.2-58); unlawfully and feloniously, on or about the 27th day of February, 1993, raping Mary Elizabeth Keller (Code Section 18.2-61); willfully, deliberately, and with premeditation, on or about the 27th day of February, 1993, feloniously, killing and murdering Mary Elizabeth Keller subsequent to raping Mary Elizabeth Keller (Code Section 18.2-31(5); on or about the 27th day of February,

1993, as a principal in the second degree, feloniously, killing and murdering Morris C. Keller, Jr. (Code Section 18.2-32); unlawfully and feloniously and maliciously, on or about the 27th day of February, 1993, in the nighttime, burning the dwelling house of Morris C. Keller, Jr., in which Morris C. Keller, Jr. and his wife, Mary Elizabeth Keller, usually dwelled (Code Section 18.2-77); as charged in the indictments.

The Court, on motion of the defendant, by counsel, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, on the 26th day of April, 1994, and sentencing is set for the 26th day of April, 1994, at 2:00 o'clock p.m., to which time this case is continued.

The Court certifies that at all times the defendant was personally present with his attorneys.

And the defendant is remanded to the Powhatan Correctional Center where he is currently confined.

Concluding Status of Defendant: In Custody in Powhatan County

ENTER:

/s/J.R. Snoddy, Jr., Judge

[Virginia:

In the Circuit Court of Cumberland County, April 26, 1994]

Commonwealth of Virginia

Vs. Order - Felonies Case No. F-144

Jeffrey Alan Cruse
SSN: 315-76-3445
Date of Birth: 12-11-67
Offense Date: 2-27-93
Judge: J. R. Snoddy, Jr.

Attorneys for the Commonwealth: Robert G. Woodson, Jr.
Warren Von Schuch

Attorneys for the Defendant: Donald C. Blessing
Lee R. Harrison

Commencing Status of Defendant: In custody

This day came the Attorneys for the Commonwealth, Robert G. Woodson, Jr. and Warren Von Schuch, and the defendant, Jeffrey Alan Cruse, who stands convicted of capital murder, first degree murder, robbery, rape, and arson, and came also Donald C. Blessing and Lee Harrison, his attorneys.

Whereupon, the accused, after private consultation with his counsel, and being advised by the Court of his right to be tried at a later date, stated that he was ready for trial and desired and consented to be tried on this day. The Attorneys for the Commonwealth and attorneys for the defendant also consented.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report he presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in

the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Office is hereby filed as a part of the record in this case.

Whereupon the Court taking into consideration all the evidence in this case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to commitment to the Department of Corrections for imprisonment for the following terms:

Life imprisonment on the charge of on or about the 27th day of February, 1993, killing and murdering Mary Elizabeth Keller subsequent to raping Mary Elizabeth Keller (Code Section 18.2-31(5));

life imprisonment on the charge of on or about the 27th day of February, 1993, as a principal in the second degree, feloniously, killing and murdering Morris C. Keller, Jr. (Code Section 18.2-32));

life imprisonment on the charge of on or about the 27th day of February, 1993, raping Mary Elizabeth Keller (Code Section 18.2-61));

50 years on the charge of on or about the 27th day of February, 1993, in the nighttime, burning the dwelling house of Morris C. Keller, Jr. and his wife, Mary Elizabeth Keller, usually dwelled (Code Section 18.2-77));

40 years on the charge of on or about the 27th day of February, 1993, robbing Morris C. Keller, Jr. of money, guns, VCR, and other tangible personal property (Code Section 18.2-58));

which said terms are to run consecutively, and that the Commonwealth of Virginia do recover against the defendant its costs by it about its prosecution in this behalf expended.

In addition, the defendant is ordered to allow the withdrawal of blood sample for DNA analysis pursuant to Virginia Code Section 19.2-310.2 and 19.2-310.3.

The Court orders that the defendant be allowed credit for the time spent in jail awaiting trial.

The Court certifies that the defendant and the defendant's attorneys were each personally present at all times during the trial of these cases, and that his attorneys capably and ably represented him.

And the defendant is remanded to jail to await transfer to the Virginia Department of Corrections.

Concluding Status of Defendant: In custody.

APPENDIX D

STATUTORY PROVISIONS

§ 18.2-31. Capitol murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

* * * *

4. The willful, deliberate and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

* * * *

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction. . . .

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the

indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment as provided in § 19.2-295.1.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission

of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
Signed ..... foreman"
or
(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.
Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

§ 19.2-264.5. Post-sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statement. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements prepared pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

§ 53.1-151. Eligibility for parole.

* * * *

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole. In the event of a determination by the Department of Corrections that an individual is not eligible for parole under this subsection, the Parole Board may in its discretion, review that determination, and make a determination for parole eligibility pursuant to regulations promulgated by it for that purpose. Any determination of the Parole Board of parole eligibility thereby shall supersede any prior determination of parole ineligibility by the Department of Corrections under this subsection.

* * * *

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

* * * *

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in §§ 53.1-191, 53.1-197 and 53.1-198.

§ 53.1-199. Eligibility for good conduct allowance; application.

* * * *

Any person who, on or after July 1, 1993, has been sentenced upon a conviction of murder in the first degree, rape in violation of § 18.2-61, forcible sodomy, animate or inanimate object sexual penetration or aggravated sexual battery and any person who has been sentenced to a term of life imprisonment or two or more life sentences shall be classified within the system established by § 53.1-201. Such person shall be eligible for no more than ten days good conduct credit for each thirty days served, regardless of the class to which he is assigned. One-half of such credit shall be applied to reduce the period of time he shall serve before being eligible for parole.

Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

(2)

No. 94-1862

In The

Supreme Court of the United States

October Term, 1994

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS PETITIONER'S CASE AN INAPPROPRIATE VEHICLE FOR REVIEWING A SIXTH AMENDMENT CLAIM THAT THE PROSECUTOR IMPROPERLY COMMENTED ON THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY:

(a) because petitioner's claim is barred from review to the extent it relies upon the prosecutor's argument to the jury?

(b) because the "conflict" relied upon by petitioner does not exist?

(c) because petitioner admitted in his trial testimony that he shot one of the victims in the head during the commission of robbery and rape?

II. DOES PETITIONER'S CLAIM THAT HE WAS ENTITLED TO INFORM HIS CAPITAL SENTENCING JURY THAT HE WOULD BE ELIGIBLE FOR PAROLE IN 25 YEARS RAISE A COGNIZABLE FEDERAL ISSUE?

III. DOES PETITIONER'S CHALLENGE TO VIRGINIA'S "VILENESS" AGGRAVATING CIRCUMSTANCE RAISE A COGNIZABLE FEDERAL ISSUE?

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No. 94-1862

In The

Supreme Court of the United States

October Term, 1994

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Virginia's opinion is published. *Williams v. Commonwealth*, 248 Va. 528, 450 S.E.2d 365 (1994). (Pet. App. 1a-22a). That Court's order denying Williams' petition for rehearing is unpublished but appears in the petitioner's appendix at 23a.

STATEMENT OF THE CASE

On January 6, 1994, after a four-day trial, a jury in the Circuit Court of Cumberland County, Virginia, convicted the petitioner, Michael Wayne Williams, of burglary, rape,

arson, two counts of robbery, two counts of abduction, and five counts of capital murder. On the non-capital charges, the jury fixed Williams' punishment at 20 years for the burglary, life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. The trial court imposed these sentences and entered final judgment on the non-capital charges in an order dated January 6.

After a separate day-and-a-half proceeding, the jury sentenced Williams to death for the capital murders of both Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, finding in both instances that Williams represented a continuing serious threat to society *and* that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.2. The trial court imposed both death sentences and entered final judgment on February 22, 1994.

Petitioner appealed only his capital murder convictions and death sentences to the Virginia Supreme Court, which affirmed on November 4, 1994. Williams' petition for rehearing was denied on January 13, 1995.

STATEMENT OF FACTS

The undisputed evidence established that the petitioner planned and participated in the robbery and abduction of Mr. and Mrs. Keller that led to the rape of

Mrs. Keller and the execution-style murder of both victims. It also is undisputed that, at the very least, petitioner fired the first shot into Mr. Keller's head. All of the relevant facts are set forth in detail in the Virginia Supreme Court's opinion. (Pet. App. 2a-5a).

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER'S CASE IS A PARTICULARLY INAPPROPRIATE VEHICLE FOR REVIEWING A CLAIM THAT A PROSECUTOR VIOLATED THE SIXTH AMENDMENT BY IMPROPERLY COMMENTING ON THE CREDIBILITY OF A DEFENDANT'S TRIAL TESTIMONY.

Williams contends that the prosecutor violated his Sixth Amendment right to confront the witnesses against him and to be present at his trial by asking him questions on cross-examination and by making arguments to the jury that emphasized the fact that, by the time petitioner testified, he already had heard the testimony of all the other witnesses. This claim is not worthy of review for several reasons:

A. Petitioner's default below

Williams' claim in this Court relies not only upon the questions the prosecutor asked him on cross-examination but also on the prosecutor's jury argument. (Pet. 6, 15). In the Virginia Supreme Court, however, petitioner's claim focused solely on the former and never even mentioned the latter. (Resp. App. 1-3). And, of course, the Virginia Supreme Court did not purport to decide any claim other

than Williams' challenge to the prosecutor's allegedly improper cross-examination. (Pet. App. 15a). Indeed, if petitioner had raised a claim in the court below about the prosecutor's jury argument, the claim would have been doubly barred by his failure to object to the argument at trial, *see* Va. S.Ct. Rule 5:25 (requiring contemporaneous objection), and by Virginia's firmly-established rule that a claim of improper jury argument may not be litigated on appeal absent a request for a curative instruction or a mistrial. *See, e.g., Cheng v. Commonwealth*, 240 Va. 26, 38-39, 393 S.E.2d 599, 605-606 (1990).

When petitioner presented his cross-examination claim to the Virginia Supreme Court, moreover, he cited none of the cases upon which he presently relies. As the Supreme Court noted when it rejected the claim, "Williams cites no case in which such a question has been held to violate a defendant's constitutional rights, and we find none." (Pet. App. 15a). It therefore would be inappropriate to grant review of the court below's decision on the basis of authority petitioner never brought to the lower court's attention.

Regardless of whether the rule is couched in terms of jurisdiction or mere prudence, this Court generally will not review a constitutional claim that never was raised in the state court below. *See Yee v. Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). It is for this reason that a petitioner is required to detail for the Court how and when his constitutional claim was raised and decided in state court. Rule 14.1(h).

Petitioner's failure to raise and preserve that aspect of his claim which relies upon the prosecutor's jury argument renders his case unsuitable for certiorari review. This is particularly true in view of the fact that all but one of the cases upon which petitioner relies to support his "conflict" argument are based entirely upon a prosecutor's allegedly improper jury argument. (See Reason IB, below).

B. Phantom "conflict"

As many petitioners do, Williams asserts that the judgment below is at odds with the decisions of other courts and that the Court should grant review to resolve the "conflict." According to Williams, the Virginia Supreme Court's decision is in conflict with *Jenkins v. United States*, 374 A.2d 581 (D.C.), *cert. denied*, 434 U.S. 894 (1977); *Dyson v. United States*, 418 A.2d 127 (D.C. 1980); *State v. Rose*, 622 A.2d 78 (Me. 1993); and *Murray v. State*, 781 P.2d 288 (Nev. 1989). (Pet. 9-11). A review of these cases, however, demonstrates that there is no true "conflict."

As previously noted, all but one of the four cases are based entirely on the prosecutor's allegedly improper argument to the jury. *See Jenkins*, 374 A.2d at 583-584; *Dyson*, 418 A.2d at 131; *Rose*, 622 A.2d at 78-79 (based only in part upon prosecutor's cross-examination); *Murray*, 781 P.2d at 290. Petitioner has failed to preserve any claim with respect to the prosecutor's jury argument.

Neither *Jenkins* nor *Rose* supports petitioner's "conflict" argument because in both cases the court found no error that warranted reversal. In *Jenkins*, the prosecutor's

comments were ultimately deemed harmless. *Jenkins*, 374 A.2d at 584-586. In *Rose*, the court ruled that the prisoner had not preserved his claim for review because he had failed to request a mistrial. *Rose*, 622 A.2d at 79. Those cases, therefore, clearly do not conflict with the judgment in Williams' case.

Dyson does not support the "conflict" argument because at no time did the court explicitly rule that the prosecutor's comments violated the Constitution. To the contrary, the court ruled only that it had "repeatedly expressed disapproval of such tactics." *Dyson*, 418 A.2d at 131. Moreover, the court found the comments prejudicial in *Dyson* only because the government's case was "entirely . . . circumstantial" and "weak" on a critical element of proof. *Id.* at 132. In petitioner's case, of course, the evidence of his guilt was both overwhelming and, for the most part, undisputed. *Dyson*, therefore, is properly read as the decision of an appellate court exercising its supervisory power over a trial court.

Finally, *Murray* cannot support petitioner's argument because, unlike Williams' Sixth Amendment claim, it is based upon a violation of a defendant's Fifth Amendment right to remain silent at the time of his arrest. *Murray*, 781 P.2d at 290-291. At no time in that case did the prosecutor question the defendant about or comment upon the fact that he had heard all of the witnesses testify before he took the stand.

This Court should not grant certiorari to resolve a conflict that is not squarely presented. *See* Rule 10.1. Clearly, none is squarely presented here.[1]

C. Petitioner's admissions at trial

According to Williams, the prosecutor should not have been permitted to impeach the credibility of his trial testimony by commenting on the fact that he had had the advantage of hearing all the witnesses testify before he took the stand. This contention, however, must be viewed in light of the fact that, even if the jury had credited petitioner's testimony in its entirety, he unquestionably was guilty of capital murder.

It is undisputed that Mr. and Mrs. Keller were premeditatedly murdered during the course of a robbery in which petitioner was a full and willing participant. It also is undisputed that Mrs. Keller was raped. And, as the Virginia Supreme Court noted, while the testimony of the petitioner and that of the co-defendant who testified against him were at odds on some of the details of the crimes, petitioner admitted before the jury that he was

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[1] In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court held unconstitutional a state statute requiring that a criminal defendant testify as the first defense witness or not at all. The Court, however, was careful "not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before" and expressly noted that "our adversary system reposes judgment of the credibility of all witnesses in the jury." 406 U.S. at 611. If, as *Brooks* indicates, the fact that the defendant testified after hearing all the other witnesses testify is a matter the jury may consider in assessing his credibility, then it also is subject to fair comment by the prosecution.

the one who initiated the idea of a robbery, that it was his idea to burn down the victims' house and, most importantly, that he shot Mr. Keller in the head after both victims were marched into the woods behind their home to be executed. (Pet. App. 4a). Thus, by Williams' own admission he was guilty of a premeditated murder during the commission of a robbery, subsequent to the commission of a rape and during the same act or transaction where another premeditated murder occurred. *See* Va. Code § 18.2-31(4), (5) and (7).[2]

Even if the Court hypothetically were inclined to review the type of Sixth Amendment claim petitioner is raising, it should do so in a case where the alleged error clearly affected the outcome of the case, *not* in a case such as petitioner's where the jury would have been required to find him guilty of capital murder even if the alleged error had not occurred and the jury fully credited his version of the crimes. This case simply is not an appropriate vehicle for reviewing Williams' claim.

II. PETITIONER'S PAROLE ELIGIBILITY CLAIM DOES NOT RAISE A FEDERAL ISSUE.

Petitioner relies upon *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), and claims that his Eighth and Fourteenth Amendment rights were violated by the trial court's refusal to instruct the penalty-stage jury regarding

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[2] Under Virginia law, to be convicted of capital murder the defendant must be the "triggerman" in a premeditated killing, but need only be a principal in the second degree to the predicate felony. *See J. Briley v. Commonwealth*, 221 Va. 563, 571-573, 273 S.E.2d 57, 62-63 (1980).

his parole eligibility. On appeal, the Virginia Supreme Court rejected the claim, finding that *Simmons* is inapplicable to capital defendants who, like Williams, are eligible for parole. (Pet. App. 10a).

At the outset, it is clear that the sole basis for this Court's decision in *Simmons* is the Due Process Clause of the Fourteenth Amendment. *See Simmons*, 114 S.Ct. at 2196 (plurality); *id.* at 2201 (O'Connor, J., concurring). Thus, *Simmons* provides no support for Williams' Eighth Amendment claim. Indeed, *Simmons* expressly declined to reach the prisoner's Eighth Amendment claim. *See* 114 S.Ct. at 2193 n.4.[3]

To the extent petitioner raises a due process claim, his case clearly is distinguishable from *Simmons*. Both the plurality and concurring opinions in *Simmons* limit the

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[3] Likewise declining to reach the Eighth Amendment issue is the only post-*Simmons* case upon which petitioner relies, *Clark v. Tansy*, 882 P.2d 527, 531 (N.M. 1994). Petitioner admits that the New Mexico case is the only decision extending this Court's due process ruling in *Simmons* to cases where the prisoner is eligible for parole and that the remainder of the post-*Simmons* cases have held, as the Virginia Supreme Court has, that *Simmons* does not apply unless the prisoner is ineligible for parole. (Pet. 17). Aside from the obvious fact that a lone, aberrant case hardly represents the kind of "conflict" necessary to obtain certiorari review, the New Mexico case cannot constitute a true "conflict" because it is expressly based upon the fact that the prosecutor in that case implied to the jury that the defendant could be paroled in as little as ten years, when in fact he could not have been paroled until he was at least 86 years old. 882 P.2d at 530, 533. In petitioner's case, the prosecutor never mentioned the possibility of parole and by petitioner's own admission he would have been eligible for parole in 25 years, i.e., when he was only 51 years old.

due process requirement to those capital cases where the defendant would be *ineligible* for parole if he received a life sentence. *See* 114 S.Ct. at 2196 (plurality) ("In a State in which parole is available, how the jury's knowledge of parole availability will affect the [sentencing] decision . . . is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury . . . regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury"); *id.* at 2200 (O'Connor, J., concurring) ("In a State in which parole is available, the Constitution does not require . . . jury consideration of that fact").[4]

Williams concedes that, unlike the defendant in *Simmons*, he would have been eligible for parole in 25 years if he had received a life sentence. (Pet. at 7 n.3, 16). By *Simmons'* very terms, then, the Virginia Supreme Court's rejection of Williams' claim raises only an issue of state law. *See* 114 S.Ct. at 2200 (O'Connor, J., concurring) ("The decision whether or not to inform the jury of the possibility of early release is generally left to the States."). This Court, of course, has no jurisdiction to review matters of state law on certiorari. *See generally Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

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[4] To whatever extent Justice O'Connor's concurring opinion may be narrower than the plurality opinion of Justice Blackmun, her position (joined by the Chief Justice and Justice Kennedy) must be deemed controlling. *See Romano v. Oklahoma*, 114 S.Ct. 2004, 2010 (1994) (controlling effect given to concurring opinion that supplies the necessary fifth vote).

This Court repeatedly has denied certiorari in post-*Simmons* cases from Virginia raising the very same claim Williams is raising. *See, e.g., Cardwell v. Virginia*, 115 S.Ct. ___, No. 94-7930 (May 1, 1995); *Wright v. Virginia*, 115 S.Ct. ___, No. 94-8271 (Apr. 24, 1995); *Swann v. Virginia*, 115 S.Ct. 234 (1994). This Court's repeated denials of certiorari are "ample evidence" that the Court does not deem the claim worthy of review. *See Maggio v. Williams*, 464 U.S. 46, 51-52 (1983).

III. PETITIONER'S CHALLENGE TO VIRGINIA'S "VILENESS" AGGRAVATING FACTOR DOES NOT IMPLICATE THE CONSTITUTIONALITY OF HIS DEATH SENTENCE.

At the guilt stage of a Virginia capital trial, the prosecution must prove not only that the defendant committed a premeditated murder, but also that the murder was committed in one of several enumerated aggravating circumstances. *See* Va. Code § 18.2-31. In petitioner's case, he was convicted of premeditated murder during the commission of robbery and rape, as well as the premeditated killing of two people as part of the same act or transaction. *See* Va. Code § 18.2-31(4), (5) and (7).

At the penalty phase of a Virginia capital murder trial, moreover, before the defendant even becomes eligible for a death sentence, the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" and/or that his conduct in committing the offense "was outrageously or wantonly vile, horrible or

inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *See* Va. Code § 19.2-264.4C. In petitioner's case, the jury found the existence of *both* "future dangerousness" and "vileness." Even then, however, the jury was free under Virginia law and the court's instructions to impose a life sentence rather than a death sentence. (Resp. App. 4).

Aggravating factors are not ends unto themselves; their constitutional function is to narrow the class of those eligible for a death sentence beyond those who commit any murder. *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988). In Virginia, this limiting function is accomplished at the guilt stage when the defendant is convicted of a narrow species of capital murder. Thus, when petitioner was convicted of three separate species of premeditated murder, no further narrowing was constitutionally required. *See Gregg v. Georgia*, 428 U.S. 153, 164 n.9 (1976) (approving constitutionality of state system where aggravator to be proved at penalty stage is that murder was committed during rape). Accordingly, even if petitioner's claim regarding Virginia's "vileness" aggravator had merit – and clearly it does not – it would raise only a matter of state law and would not affect the constitutionality of his death sentence. *See generally Michigan v. Long*, 463 U.S. at 1038 (no jurisdiction to review state law issues on certiorari).

Moreover, Virginia is a "non-weighing" State where aggravating circumstances do not play a decisive role in the jury's determination whether to impose a death sentence. *See Swann v. Commonwealth*, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, *cert. denied*, 115 S.Ct. 234 (1994). In Williams' case, in addition to finding "vileness," the jury

also found the "future dangerousness" aggravator. (Pet. App. 2a). Thus, even if, hypothetically, Virginia's "vileness" factor were vague, the remaining "future dangerousness" factor would be sufficient to sustain his death sentence.[5] *See Stringer v. Black*, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). *See also Zant v. Stephens*, 462 U.S. 862, 884-891 (1983); *Clanton v. Muncy*, 845 F.2d 1238, 1243 (4th Cir.) (applying *Zant* to a Virginia capital case), *cert. denied*, 483 U.S. 1084 (1988).

Petitioner's vagueness challenge, moreover, simply has no merit. Vagueness review is required to be "quite deferential." *Tuilaepa v. California*, 114 S.Ct. 2630, 2632 (1994). So long as the aggravating factor has a "commonsense core of meaning," it must be upheld. *Id.* at 2635. The United States Court of Appeals for the Fourth Circuit repeatedly has upheld the constitutionality of Virginia's "vileness" factor as it has been construed, limited and applied by the Virginia Supreme Court. *See, e.g., Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), *cert. denied*, 115 S.Ct.

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[5] In view of the fact that Virginia accomplishes the constitutionally-required narrowing function at the guilt stage and, moreover, is a "non-weighing" State, petitioner's assertion of a supposed "conflict" with decisions pertaining to aggravators in other States is irrelevant. It is no doubt for this reason that the Court repeatedly has denied certiorari petitions from Virginia prisoners raising claims identical to petitioner's. *See, e.g., Cardwell*, 115 S.Ct. ___, No. 94-7930; *Breard v. Virginia*, 115 S.Ct. 442 (1994).

1359 (1995); *Jones v. Murray*, 976 F.2d 169, 174-175 (4th Cir.), *cert. denied*, 113 S.Ct. 27 (1992); *Bunch v. Thompson*, 949 F.2d 1354, 1367 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 3056 (1992). This Court should defer to the Fourth Circuit's view. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (deference warranted because lower federal courts "better schooled in and more able to interpret the laws of their respective States").

While conducting its mandatory review of petitioner's death sentence pursuant to Virginia Code § 17-110.1, the Virginia Supreme Court concluded that the jury's finding of "vileness" was "amply justifie[d]" by the evidence. (Pet. App. 21a). When the Virginia Supreme Court thus applied its limiting construction of the "vileness" circumstance, the Constitution required nothing more. *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).[6]

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[6] Petitioner is simply wrong when he asserts that language identical to Virginia's statutory "vileness" factor was held to be vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Indeed, such language expressly was upheld against a "vagueness" attack in *Gregg v. Georgia*, 428 U.S. at 201, 202 n.54. The problem in *Godfrey* was caused, *not* by the statutory language, but by the fact that the jury returned a truncated verdict that omitted the "in that it involved torture, depravity of mind, or an aggravated battery to the victim" language and by the Georgia Supreme Court's failure on appeal to cure that defect. *See Godfrey*, 446 U.S. at 426, 428. Neither defect is present in petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

VIRGINIA:

IN THE SUPREME COURT

MICHAEL WAYNE WILLIAMS,

Appellant,

v. **Record No. 940445**

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Appellant, Michael Wayne Williams, defendant in the Circuit Court of the County of Cumberland, respectfully represents to this Court that he is aggrieved by the judgments of conviction and sentences entered herein on February 22, 1994.

* * *

ASSIGNMENTS OF ERROR

* * *

25. The trial court erred in overruling Defendant's objection to the Commonwealth's question to the Defendant on cross-examination that he was the only witness who had sat through the trial and heard the testimony of every witness.

* * *

QUESTIONS PRESENTED

* * *

26. Whether the trial court erred in overruling Defendant's objection to the Commonwealth's question to

the Defendant on cross-examination that he was the only witness who had sat through the trial and heard the testimony of every witness.

* * *

ARGUMENT

* * *

XXI. THE TRIAL COURT ERRED WHEN, OVER WILLIAMS' OBJECTION, IT PERMITTED THE COMMONWEALTH TO ATTEMPT TO IMPEACH WILLIAMS' TESTIMONY BY REFERENCE TO WILLIAMS' EXERCISE OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AND TO CONFRONT WITNESSES.

The trial court erred when, over Williams' objection, it permitted the Commonwealth to attempt to impeach Williams' testimony by reference to the fact that he was the only person permitted to observe the testimony of all witnesses. (App. 1212-14). The trial court's error impermissibly burdened Williams' exercise of his right to confront his accusers, to be present at all times during his trial, to present evidence in his favor and to compel process. U. S. Const., Amends. V, VI and XIV; Va. Const. Art. I, § 8; Va. Code Ann. § 19.2-259, 1950, as amended; *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Cox v. Commonwealth*, 227 Va. 324, 315 S.E.2d 228 (1984); *Faretta v. Commonwealth*, 422 U.S. 806, 819 (1975); *Harris v. New York*, 401 U.S. 222, 230 (1971).

The Commonwealth's attempts to impeach Williams on the grounds that he had heard the testimony of other witnesses is the functional equivalent of an attempt to require him to testify first or not at all, which is an

impermissible burden on his exercise of his constitutional rights. See *Brooks v. Tennessee*, 406 U.S. 605 (1972). Further, the Commonwealth's action was of the type condemned by the United States Supreme Court in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the Court concluded that comments by the court or prosecutor regarding the defendant's failure to take the witness stand were constitutionally impermissible. The Court characterized comment on the defendant's silence as "a penalty imposed by courts for exercising a constitutional privilege" in that it "cuts down on the privilege by making its assertion costly." *Id.* at 613.

The exercise of the right to present a defense may be burdened when a defendant elects to testify. He is exposed to proper cross-examination, which may impeach his credibility. The very existence of the right, however, may not properly be used to impeach him. The prosecution in this case used the mere presence of Mr. Williams as evidence with which to impeach him. The Court of Appeals, in a case involving a guaranteed right, has held that the courts may not permit a defendant's constitutional right not to be compelled to give evidence against himself to be used against him. *Farmer v. Commonwealth*, 10 Va. App. 175, 390 S.E.2d 775, 781 (1990).

In the instant case, the error can in no sense be seen as harmless. Important issues of guilt and punishment rested on the relative credibility of Williams and the co-defendant, Jeffrey Allen Cruse. The Commonwealth had plainly vouched for the credibility of Cruse. It cannot be said that its attempt to impeach Williams by his exercise of his constitutional right to be present and to present a defense was harmless.

PENALTY-STAGE INSTRUCTION

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

(1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

Supreme Court, U.S.
FILED
JUN 15 1995
OFFICE OF THE CLERK

(3)

No. 94-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1862

MICHAEL WAYNE WILLIAMS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises three important issues warranting review by this Court: (1) whether a prosecutor may comment on a defendant's exercise of his right to confront the witnesses against him; (2) whether a state may prohibit a capital defendant from informing the sentencing jury that he will be ineligible for parole for a significant period of time; and (3) whether Virginia's "vileness" factor, standing alone, is unconstitutionally vague. Respondent's brief in opposition offers no valid reason why this Court should deny review.

A.

At trial, the prosecutor urged the jury to infer from Petitioner's exercise of his Sixth Amendment right to confront the witnesses against him that Petitioner's testimony was fabricated and not credible. As Petitioner explained (Pet. 9-16), the Virginia Supreme Court's decision upholding the prosecutor's conduct deepens a three-way conflict among state courts of final

resort over the constitutionality of such remarks. The decision below is also flatly inconsistent with this Court's opinion in *Griffin v. California*, 380 U.S. 609 (1965). Furthermore, as this issue affects every case in which a criminal defendant considers testifying, it is of indisputable importance.

The Commonwealth's response is noteworthy for what it does not and cannot say. Respondent does not deny that this issue is important and recurring. Nor does it dispute that the decision below conflicts with *Griffin*. Indeed, Respondent fails to make any serious attempt to defend the decision on its merits.[1] Instead, it asserts several specious procedural objections and makes a futile and entirely unpersuasive effort to show that there is no conflict among the lower courts.

1. Respondent first contends (Opp. 3-5) that Petitioner failed to preserve the confrontation issue. The record plainly belies this claim. It demonstrates that Petitioner raised a Sixth Amendment objection during the prosecutor's cross-examination of him, that the trial court overruled that objection after a colloquy with counsel, and that the Virginia Supreme Court addressed the issue on its merits. *See* Pet. App. 15a; 3 Tr. 1212-14. Thus, there is no evidence whatsoever of a procedural default.

Respondent's suggestion that Petitioner should have interrupted the prosecutor's closing argument to renew an objection already rejected by the trial court is meritless. In the first place, the prosecutor's misconduct during cross-examination is reversible error wholly apart from the repetition of that misconduct during summation. Furthermore, a 1992 amendment to the Virginia Code makes clear that "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to

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[1] Respondent does assert (Opp. 7 n.1) that, if a jury may infer from the defendant's presence at trial that his testimony is fabricated, then the prosecutor may urge the jury to make that inference. However, as demonstrated in the Petition (Pet. 14), this is precisely the argument that the Court rejected in *Griffin*.

appeal." Va. Code Ann. § 8.01-384(A) (Michie 1992); *see also Millard v. Commonwealth*, No. 0237-94-1, 1995 Va. App. LEXIS 316, at *4 (Va. Ct. App. April 4, 1995) (applying § 8.01-384(A) in a criminal matter). The authorities cited by Respondent (Opp. 4) do not even purport to deal with the impact of this amendment.

2. Respondent contends (Opp. 4) that it would be inappropriate to grant review because Petitioner did not inform the Virginia Supreme Court of the cases from outside of Virginia cited in the petition. This is frivolous. This Court has never suggested that a party seeking certiorari may rely only upon the cases cited below. To the contrary, last Term this Court recognized that review of questions of law is "conducted in light of all relevant precedents, not simply those cited to or discovered by the [lower] court." *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994).

3. Respondent also disputes (Opp. 5-6) whether the cases cited in the Petition conflict with the decision below. This argument is meritless as well.

First of all, in an attempt to rehabilitate its procedural default argument, Respondent claims (Opp. at 5) that several cases cited by Petitioner are distinguishable because they involve prosecutorial misconduct during summation rather than during cross-examination. Even apart from the flawed in the premise of this argument, *see supra* p. 2, this claim is groundless. To begin with, there is a square conflict among the lower courts concerning the constitutionality of prosecutorial comment on the exercise of the right of confrontation *during cross-examination*. *Compare State v. Rose*, 622 A.2d 78, 79 (Me. 1993) (holding such comment unconstitutional), *with State v. Hoxsie*, 677 P.2d 620, 622 (N.M. 1984) (finding such comment constitutional), *overruled on other grounds, Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989). Moreover, those decisions explicitly recognize that the timing of the prosecutor's comments makes no difference. In *Rose*, 622 A.2d at 79, the Supreme Judicial Court of Maine instructed prosecutors in that State to refrain from making such comments during both cross-examination and summation, and in

Hoxsie, 677 P.2d at 622, the New Mexico Supreme Court resolved a constitutional challenge to a comment *during cross-examination* by relying upon *State v. Robinson*, 384 A.2d 569 (N.J. Super. Ct. App. Div. 1978), a case involving a comment during summation. Furthermore, Respondent fails even to suggest how a meaningful distinction may be drawn between prosecutorial comments made during cross-examination and those made during summation.

Respondent's other attempts to distinguish the cases cited in the petition (Opp. 5-7) are equally meritless. For the most part, Respondent simply mischaracterizes the pertinent decisions. For example, Respondent claims (Opp. 6) that "[a]t no time in [*Murray v. State*, 781 P.2d 288 (Nev. 1989),] did the prosecutor question the defendant about or comment upon the fact that he had heard all of the witnesses testify before he took the stand." However, as Petitioner explained (Pet. 10-11), the prosecutor in *Murray* plainly stated that "Mr. Murray was able to sit here and listen to everyone testify." *Murray*, 781 P.2d at 290.[2] Equally unfounded is Respondent's claim (Opp. 6) that *Dyson v. United States*, 418 A.2d 127 (D.C. 1980), involved an appellate court's exercise of its supervisory powers. Far from invoking such powers, *Dyson* explicitly relied upon *Jenkins v. United States*, 374 A.2d 581 (D.C.), *cert. denied*, 434 U.S. 894 (1977), which held that prosecutorial comment on a defendant's exercise of the right of confrontation violates the Sixth Amendment (*see* Pet. 10).

Respondent also argues (Opp. 5-6) that the decisions in *Rose* and *Jenkins* cannot support a conflict because the judgments in

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[2] Respondent also contends (Opp. 6) that *Murray* is based "upon a violation of a defendant's Fifth Amendment right to remain silent." Be that as it may, it is clear that *Murray* conflicts with the decision below: the Nevada Supreme Court held it unconstitutional for a prosecutor to urge the jury to draw an adverse inference because the defendant could "listen to the testimony of other witnesses" and "fabricate a story consistent with the other testimony before he had to testify." 781 P.2d at 291.

those cases were not reversed. This argument places form over substance. The court in *Jenkins* reached the question of harmless error only because it found a substantive error — specifically, that the prosecutor's comment on the defendant's exercise of the right of confrontation was unconstitutional. Moreover, as *Dyson* demon-strates, *Jenkins* is binding precedent in the District of Columbia. Similarly, while in *Rose* the Supreme Judicial Court of Maine could have avoided the Sixth Amendment issue on procedural grounds, it instead instructed prosecutors in that State in no uncertain terms to "refrain from asking improper questions and making inappropriate comments which are strategically designed to cast a defendant's most basic constitutional rights in a negative light." 622 A.2d at 79. As a consequence, it is clear that the decision below conflicts with decisions of the highest courts in Nevada, the District of Columbia, and Maine.

Finally, there can be no doubt that the decision below conflicts with the decision of the Michigan Supreme Court in *People v. Buckey*, 378 N.W.2d 432 (Mich. 1985). As Petitioner demonstrated (Pet. 11-12), in *Buckey* the Michigan Supreme Court permitted comment on a defendant's presence at trial only where there is evidence of fabrication. Unable to reconcile the decision below with the approach taken in *Buckey*, Respondent simply ignores it. Thus, despite Respondent's contentions to the contrary, it is clear that the decision below conflicts with the decisions of at least four other state courts of final resort.

4. Respondent's suggestion (Opp. 7-8) that this Court should deny review because Petitioner admitted committing a capital murder is disingenuous. The prosecutor began his cross-examination of Petitioner by highlighting the fact that Petitioner had sat through the trial and heard all of the evidence (*see* Pet. 6). Indeed, the prosecutor made Petitioner's presence at trial the centerpiece of his cross-examination and he returned to this point toward the end of cross-examination as well as in his summation because that point was crucial to his case. Respondent cannot now suggest that these statements were immaterial and irrelevant.

As the petition demonstrated (Pet. 4-7, 15), the prosecutor's repeated attacks on Petitioner's credibility were purposeful and highly prejudicial. They were designed to ensure that the jury believed the testimony of Jeffrey Alan Cruse, Petitioner's co-assailant. Although Cruse also admitted committing a capital murder, he was spared the death penalty because he contended Petitioner bore primary responsibility for the crimes committed against Morris and Mary Keller. Absent the improper comments of the prosecutor, the jury may well have believed that Cruse, not Petitioner, bore primary responsibility for those crimes and sentenced Petitioner to life imprisonment. The possibility that the jury may have sentenced Petitioner to death as a result of the prosecutor's misconduct provides ample justification for this Court's review.

B.

The second question presented by this case is whether a state may prohibit a capital defendant from informing the jury that he will be ineligible for parole for a substantial period of time. As the petition demonstrates (Pet. 16-22), this important and recurring question was left open in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), and in the year since that decision conflict and confusion have already arisen among the lower courts. In addition, the lower courts are split over whether the Eighth Amendment requires admission of such evidence.

1. Respondent's first argument (Opp. 8-10) is that this issue does not present a federal question. This is frivolous. Petitioner plainly based his request to inform the jury of his parole eligibility upon the "Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States," 1 Tr. 48, and he cited federal, not state, cases to the Virginia Supreme Court. *See* Brief of Appellant, at 25-27, *Williams v. Commonwealth*, No. 94-0445 (Va. 1994). Furthermore, the Virginia Supreme Court rejected Petitioner's claim based not on state law, but on a decision issued that same day interpreting *Simmons* to apply only to cases of total parole ineligibility. *See* Pet. App. 10a (relying upon *Ramdass v.*

Commonwealth, 450 S.E.2d 360, 361 (Va. 1994), *cert. denied*, 115 S. Ct. 1800 (1995)).

2. Respondent's suggestion (Opp. 9-10) that *Simmons* decided the issues presented here is meritless. In the first place, as Respondent concedes (Opp. 9), *Simmons* did not consider the applicability of the Eighth Amendment. *See* 114 S.Ct. at 2193 n.4. Furthermore, the lower courts would not be in conflict over the application of the Due Process Clause to partial parole eligibility if *Simmons* had resolved this issue. Contrary to Respondent's suggestion, the plurality and concurring opinions in *Simmons* did not limit the application of the Clause to instances of parole ineligibility; they simply limited their holdings to the facts before the Court. Moreover, Justice Scalia took the position that *Simmons* could *not* be limited to parole eligibility. In his view, the decision was "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness." *Id.* at 2203 (Scalia, J., dissenting) (emphasis in original).

3. Respondent also contends (Opp. 11) that the parole eligibility issue is not worthy of review because this Court has denied certiorari in three prior cases. It is well-settled, however, that "[a] variety of considerations underlie denials of the writ," *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950), and that therefore "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923). This Court, as Justice Brennan has noted, may deny certiorari in a particular case and then "take the very next case raising the same question." R. Stern & E. Gressman, *Supreme Court Practice* 240 n.56 (7th ed. 1993) (quoting W. Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 402-03 (1960)).[3]

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[3] The case cited by Respondent (Opp. 11), *Maggio v. Williams*, 464 U.S. 46 (1983) (per curiam), does not suggest otherwise. *Maggio* involved a stay of execution, not a petition for certiorari, and the Court

Furthermore, this petition presents a far more compelling case than the petitions cited by Respondent. Those petitions did not inform the Court that there was any conflict among the lower courts. *See* Petition for a Writ of Certiorari, at 10-22, *Cardwell v. Commonwealth of Virginia*, No. 94-7930 (U.S. Feb. 2, 1995); Petition for a Writ of Certiorari, at 15-19, *Wright v. Commonwealth of Virginia*, No. 94-8271 (U.S. Feb. 2, 1995); Petition for a Writ of Certiorari, at 8-13, *Swann v. Commonwealth of Virginia*, No. 94-5190 (U.S. July 14, 1994). The instant petition clearly demonstrates (Pet. 16-22) that there is such a conflict. As a consequence, unlike the petitions cited by Respondent, this petition presents a powerful reason to review the issue of partial parole eligibility.

4. Finally, Respondent does not and cannot claim that the trial court's refusal to inform the jury of Petitioner's parole eligibility was harmless error. Under Virginia's capital sentencing scheme, the jury may consider any evidence before it in determining whether to recommend the death penalty. *See* Va. Code Ann. § 19-2-264.4(B) (Michie 1990), Pet. App. 31a. By refusing to inform the jury of Petitioner's parole eligibility, the trial court deprived the jury of probative, mitigating evidence, thereby necessitating reversal under Virginia law. *See Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995).

C.

The final issue presented in the petition is whether Virginia's vileness aggravating factor, standing alone, is unconstitutionally vague. As the petition demonstrated (Pet. 25-28), the decision below is inconsistent with decisions in at least 17 other states and

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considered prior denials of certiorari because the standard for granting such a stay is whether there is "a reasonable probability that four members of the Court would consider the [issues in the case] sufficiently meritorious for the grant of certiorari." 464 U.S. at 48 (quotation omitted). This Court has never extended *Maggio* beyond this narrow context.

with this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Respondent does not and cannot dispute these points.

1. Respondent does once again contend (Opp. 12) that there is no federal question. Here again, however, it is clear that Petitioner challenged the vileness instructions on federal grounds, *see* 1 Tr. 79-91, and that the Virginia Supreme Court rejected that challenge based upon its prior rejection of a claim of unconstitutional vagueness. Pet. App. 5a (citing *Mickens v. Commonwealth*, 442 S.E.2d 678, 684 (Va.), *vacated on other grounds*, 115 S.Ct. 307 (1994)). Moreover, Respondent's substantive argument — that after *Lowenfield v. Phelps*, 484 U.S. 231 (1988), it does not matter whether Virginia's aggravating factors are vaguely worded — has been expressly rejected by this Court. *See Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (finding *Lowenfield*'s relevance to *Godfrey* and the issue of vagueness "slight at best").

2. Respondent also contends (Opp. 14) that the Virginia Supreme Court applied a limiting construction. In support of this contention, it points to the statement in the decision below that the evidence in the record "justifies the jury's finding of the 'vileness' of the Keller murders and of Williams's 'future dangerousness.'" Pet. App. 21a. There is, however, no indication in this statement, which occurred in the course of the Virginia Supreme Court's proportionality review, that the Virginia Supreme Court actually applied any limiting construction. Nor is there any indication in the Virginia Code or in Respondent's brief that the Virginia Supreme Court, when faced with an improper jury instruction, would find facts itself rather than vacate and remand for further fact finding.

3. Finally, Respondent argues (Opp. 13-14 & n.6) that the decision below was correct on the merits. It contends that *Godfrey* was not based upon the statutory language but upon the particular facts of that case. However, in a series of cases ignored by Respondent (*see* Pet. 27-28), this Court has consistently construed *Godfrey* to be based upon the statutory language and specifically found that it has broad application. *See,*

e.g., *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993) (noting that this Court has found "pejorative adjectives such as . . . 'outrageously or wantonly vile, horrible and inhuman'" unconstitutionally vague). Equally baseless is Respondent's contention (Opp. 13-14) that the Fourth Circuit has consistently rejected challenges to Virginia's vileness factor. Although the Fourth Circuit has upheld the factor where a limiting construction was applied, it has recognized Virginia's vileness factor as "facially vague." *Turner v. Williams*, 35 F.3d 872, 880 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).[4]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 15, 1995

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[4] Respondent also errs in arguing (Opp. 13) that the vileness issue does not warrant review because the jury found future dangerousness. Petitioner is seeking review of the jury's finding of future dangerousness; if he prevails, the courts below will need guidance on how to apply the vileness factor constitutionally.